IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD
(Special Original Jurisdiction)

TUESDAY, THE TWENTY FIRST DAY OF SEPTEMBER
TWO THOUSAND AND FOUR

PRESENT

THE HONOURABLE SRI JUSTICE B. SUDERSHAN REDDY

THE HONOURABLE SRI JUSTICE J. CHELAMESWAR

THE HONOURABEL SRI JUSTICE GHULAM MOHAMMED

THE HONOURABLE SRI JUSTICE A. GOPAL REDDY

AND

THE HONOURABLE SRI JUSTICE K.C. BHANU

W.P Nos. 12239, 12552, 12653, 12744, 13059, 13073 & 13113 of 2004

WRIT PETITION NO : 12239 of 2004

Between:

T.Muralidhar Rao S/o. Ananthasain Rao
R/o. Esamiya Bzaar, Hyderabad.

..... PETITIONER

AND

1) The State of A.P.,
Rep. by Principal Secretary to Government
Backward Classes Welfare Department,
Secretariat, Hyderabad-500 004.

2) M.Baquar Hussain Shaz S/o. Late Mohd. Ibrahim
Hussain, aged 64 years, Occ: Journalist Editor
Saz-e-Deccan Urdu Daily, R/o. Devan Devdi,
Salar Jung Complex, Hyderabad – 2.

3) Mahaboob Alam Khan S/o. Shah Alam Khan,
aged about 62 years, R/o. Rahat Kada, Barkatpura,
Hyderabad, A.P.

4) Asaduddin Owaisi S/o. Sultan Salauddin Owaisi,
aged about 35 years, Member of Parliament,
Hyderabad Parliamentary Constituency,
R/o.Hyderabad, Andhra Pradesh.

5) Obaid-Ur-Rahman S/o. Late Dr. Shahnawaz,
aged 47 years, R/o.1-8-574, Patigadda Road,
Begumpet, Secunderabad.

6) Zafar Javed S/o. Late Amjad Ali Khan,
aged 47 years, R/o. Basheerbagh, Hyderabad.

7) K. Ruknuddin S/o. Khaja Qutubuddin,
aged 71 years, R/o. Road No.4, Banjara Hills,
Hyderabad.

8) S.A. Wahad S/o. Late Syed Abdullah,
aged 55 years, R/o. Saifabad, Hyderabad.

9) Sultan-Ul-Uloom Educational Society
Rep. by its Secretary Dr Hyder Khan
S/o. Md. Abdul Raheem Khan, aged 75 years,
R/o. Road No.2, Banjara Hills, Hyderabad.

10) United Muslim Forum, Madina Mansion,
Narayanguda, Hyderabad,
Rep. by its Secretary Mohd. Rahimuddin Ansari.

11) Akbaruddin Owaisi S/o. Sultan Salauddin Owaisi,
Indian, aged about 35 years, R/o. Hyderabad.

12) Anjuman-e-Islamia, Vijayawada,
Rep. by its Secretary Habeeurahman
S/o. Abdul Wajid, aged about 30 years,
Muslim, Door No.9-61-20, B.R.P. Road,
Isalampet, Vijayawada-520 001, Krishna Dist.

13) All India Sufi Conference

Rep. by its Secretary Mr. Mir Kamaluddin Ali Khan
S/o. Mir Najabeth Ali Khan, aged 58 years,
R/o. Lakdikapul, Hyderabad.

14) United Minority Front
Rep. by its Secretary Mr. Zafar Javeed
S/o. Late S.M. Amjad Ali Khan,
Aged 45 years, R/o. Basheerbagh, Hyderabad.

15) The Munsif Daily
(A National Urdu Daily News Paper)
Rep. by its Publisher and Editor-in-Chief
Sri Khan Lateef Mohd. Khan,
KLK Commercial Estate, Fatehmaidan Road,
Hyderabad.

16) Basheeruddin Babu Khan
S/o. Late A.K. Babu Khan, aged 63 years,
Former Cabinet Minister, R/o.6-3-1111/4,
Begumpet, Hyderabad – 500 016.

17) Sk. Yousuf Baba S/o. Ghulam Mohammed
aged 32 years, Occ: Freelance Journalist,
R/o. Kesarajupalli, Tipparthi Mandal,
Nalgonda District.

18) Dr. P.H. Mohammad S/o. S. Hussain
aged about 36years, R/o. Pedda Hothur Village,
Alur Mandal, Kurnool District.

19) Muslim Lawyers Forum – Indian & International
Rep. by its Secretary Md. Ajmal Ahmed Advocate,
having the office at 11-3-627, Mosque Road,
New Mallepally, Hyderabad.

20) The A.P. Minority Employees Welfare Association
Rep. by its Chairman Mohd. Raheemuddin
S/o. Late Nasar Mohammed, aged 61 years,
R/o.3-6-136/9, St. No.18, Himayathanagar, Hyd.

21) Forum for Equity and Justice
Rep. by its Convenor Mr. M.A. Hakeem
S/o. Mohd. Abdul Khader,
R/o.1601, Babukhan Estate, Basheerbagh, Hyd.

22) Mrs. Hameedunnisa Begum W/o. Sri S. Dawood,
aged about 60 years, Occ: Retired Teacher of
Primary School, Moula Ali, Hyderabad.

23) Muslim Educational Society (All India)
Andhra Pradesh (MES, A.P.),
Rep. by its Secretary, M.S. Farooq
S/o. Dr. M.A. Ahmed, aged about 39 years,
Educationist, Office at H.No.11-3-848,
Ground Floor, Mallepally, Hyderabad, A.P.

24) Federation of Muslim Managed Educational
Institutions of Andhra Pradesh, Rep. by its
General Secretary Md. Muneeruddin ahmed Alvi
S/o. Md. Shabbir Ahmed Alvi, aged about 52
Years, Occ: Educationist, Office at 16-8-235,
Malakpet, Kaladera, Hyderabad.

25) The Muslim Educational Social & Cultural
Organisation (MESCO), having its office at
22-1-1037/1, Darul Shifa, Hyderabad,
Rep. by its Secretary Dr. Fakhruddin Mohammed.

26) The Al-Habeeb Charitable Trust
having its office at 10-4-1/A/12 [C] Opp. NMDC,
Masab Tank, Hyderabad, Rep. by its Chairman
Syed Mujeebuddin

27) The A.P. Noorbash / Dudekula Muslim Welfare
Association, Rep. by its General Secretary
Shaik Sattar Saheb S/o. Late Shaik Uddand Saheb,
Aged 59 years, R/o.8-3-966/9, Sreenagar Colony
Road, Nagarjuna Nagar, Ameerpet, Hyderabad – 73.

28) A.P. Minority Employees Association
Rep. by its State President Sri Mohammed Iqbal

Office at H.No.22-43/A, Vivekananda Nagar,
Dilsukhnagar, Hyderabad.

29) Nuarani Mosque Committee, Regd. No.299/2001,
Rep. by its Secretary Mr. K.M. Jeelani Basha
S/o. Khaja Hussain, aged about 40 years,
D.No.15/223, Nuarani Masjid Street, Kadapa,
Kadapa District.

30) Bukaria Educational Society, Regd. No.324/1987,
Rep. by its Secretary, S. Nazeer Ahmed
S/o. S. Gouse Moiuddin, aged about 41 years,
D.No.13/386, Mahammed Rahamatulla Street,
Kadapa District.

31) Muslim Marakazi Jamath
Rep. by its President Mr. S.A. Hameed
S/o. Syed Abbas, Palamaner, Chittoor Dist.

32) The Madina Education Society
Opp: Public Garden Road, Nampally, Hyderabad.

33) Smt. Afzal Begum W/o. M.A. Baqui,
aged about 65 years, Occ: Household,
R/o.H.No.17-4-440, Outside Dabeerpura,
Hyderabad.

...RESPONDENTS

(R2, R3, R4, RR5 to 9, R10, R11, R12, RR13&14, R15 are impleaded as per Court order dated 27.7.2004 in WPMPs 16682/04, 16698/04, 16700/04, 16748/04, 16758/04, 16770/04, 16775/04, 16776/04, 16777/04.

RRs 16 to 33 are impleaded as per Court orders dated 21.9.2004 in WPMPs 16844, 16951, 17120, 17201, 17252, 17268, 17321, 17322, 17323, 17326, 17327, 17328, 17373, 17453, 17589, 17603 & 17866 of 2004 respectively)

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ or order or direction one in the nature of writ of mandamus, i) declaring the impugned G.O.Ms.No.33 Backward Classes Welfare (C2) Department Dt.12.7.2004 of the respondent, as arbitrary illegal and the same may be struck down; ii) costs be awarded to the petitioner; and pass such other order or orders appropriate in the circumstances of the case.

Counsel for the Petitioner: Mr. K. Ramakrishna Reddy for MR.B.MAHENDER REDDY

Counsel for the Respondent No1.:The Advocate General

Counsel for Respondent No.2: Mr.K.Ashok Reddy

Counsel for Respondent No.3: Mr.K.G.Kannabhiran, Senior Advocate for Mr.B.Nalin Kumar

Counsel for Respondent No.4: Mr.S.Ramchandra Rao, Senior Advocate for Mr.K.R.Prabhaker.

Counsel for Respondent No.5 to 9: Mr.S.Niranjan Reddy

Counsel for Respondent No.10: Mr.B.Ramakrishna

Counsel for Respondent No.11: R.V.Chalapathi

Counsel for Respondent No.12&27: Mr.S.M.Subhani

Respondent No.15.Mr.Khan Lateef Mohammed Khan – Party -in- person.
Counsel for Respondent No.16: Mr.M.Sudheer Kumar

Counsel for Respondent No.17: K.Bala Gopal

Counsel for Respondent No.18: K.Vijay Chowdhary

Counsel for Respondent No.19: M.A.Bari

Counsel for Respondent No.20: S.M.Subhan

Counsel for Respondent No.21: Mr.Noushad Ali

Counsel for Respondent No.22: Sofia Begum

Counsel for Respondent No.23&24: Mr.Khaja Moizuddin

Counsel for Respondent No.25&26: Mr.M.M.Firdose

Counsel for Respondent No.28: Mr.B.Vijayasen Reddy

Counsel for Respondent No.29&30: Mr.C.V.Mohan Reddy

Counsel for Respondent Nos 13, 14,21 & 31: Mr.Noushad Ali

Counsel for Respondent No.32: Basheer Mohammed Khan

Counsel for Respondent No.33: Mohd.Abdul Basit

Amicus Curie : Sri Challa Seetharamaiah, Senior Advocate.

WRIT PETITION NO : 12552 of 2004

Between:

1 Y.Srikanth, S/o Y.Aga Rao,
R/o College Road, Manchiryal, Adilabad District.

2 P.Vamsikrishna, S/o Srinivasa Reddy,
R/o Aruna Cooperative Society, Kukatpalli,
Hyderabad

..... PETITIONERS

AND

1 State of Andhra Pradesh
Rep. by its Principal Secretary,
Backward Classes Welfare Department,
Secretariat, Hyderabad.

2 NTR University of Health & Sciences,
Rep.by its Registrar, Vijayawada.

3 The Convenor, EMCET-2004(Admissions),
Sanketikabhavan, Masabtank, Hyderabad.

4. Mohd. Jani S/o. Mohd. Aqbar,
aged about 56 years, Ex. Minister,
R/o. Guntur, Guntur District.

5. Dr. Mohd. Attavur Rahman S/o. Abdul Wahab,
aged about 47 years, R/o.40-1-140/1, Ashraf
Hospitals, Labbipet, Vijayawada – 10.

6. Bezwada Minority Advocates Welfare Association,
a registered Society, (No.55/1999) Vijayawada,
Rep. by its General Secretary Mr. Abdul Mateen
S/o. Abdul Azeez, aged 44 years, Advocate, Vijayawada.

7. Akbaruddin Owaisi S/o. Sultan Salauddin Owaisi,
Indian, aged about 35 years, R/o. Hyderabad.

8. The Munsif Daily
(A National Urdu Daily News Paper)
Rep. by its Publisher and Editor-in-Chief
Sri Khan Lateef Mohd. Khan,
KLK Commercial Estate, Fatehmaidan Road,
Hyderabad.

.....RESPONDENTS

(R4-R8 are impleaded by Court order dated 27.7.2004 in WPMPs 16714, 16767, 16768 and 16778 of 2004)

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ, or Order or direction more particularly one in the nature of Writ of Mandamus declaring respondents in conferring the reservations for persons from Muslim community to the extent of 5% vide G.O.Ms.No.33, dated 12-07-2004 as unconstitutional and consequently set aside the G.O.Ms.No.33, dated 12-07-2004.

Counsel for the Petitioner: Mr.Ramesh Ranganathan, Senior

Advocate for MR.N.B.SANKAR

Counsel for Respondent No.1 : The Advocate General

Counsel for the Respondent No2.: DR.Y.PADMAVATHI

Counsel for Respondent No.3: None

Counsel for Respondent No.4: Mr.S.Ramchandra Rao for
Mr.K.R.Prabhaker.
Counsel for Respondent Nos 5&6: Mr.SS Prasad for
Ms.Sindhu Kumari
Counsel for Respondent No.7: Mr.Rajeev Dhawan, Senior
Counsel for Mr.C.Damoder Reddy.

Counsel for Respondent No.8: Mr.R.V.Chalapathi

WRIT PETITION No.12653 of 2004

Between:

1 C. Srinivas Reddy, S/o Gangi Reddy,
R/o Village Nancherla, Gandiveedu Mandal,
Ranga Reddy District.

2 M. Srisailam, S/o Lingaiah,
R/o Gambhirpur Village, Dubbaka Mandal,
Medak District.

..... PETITIONERS

AND

1. The State of A.P.
Rep. by its Principal Secretary to Govt.,
Backward Classes Welfare Department,
Secretariat Buildings, Hyderabad.

2. S.M. Lal Jan Pasha S/o. Late S.M. Tajuddin,
aged 49 years, Member of Rajya Sabha,
R/o. No.12, Banjara Hills, Hyderabad.

3. The Forum for Equity and Justice
Rep. by its Convenor Mr. M.A. Hakeem
S/o. Mohd. Abdul Khader
1601, Babukhan Estate, Basheerbagh,
Hyderabad.

4. The Center for Minorities' Empowerment
Rep. by its Director Aariz Mohammed
S/o. Late Usman Shariff, aged 40 years,
R/o. 12-5-82, Vijayapuri, South Lalaguda,
Secunderabad.

5. The All India Sufi Conference
Rep. by its Secretary Mr. Mir Kamaluddin Ali Khan
S/o. Mir Najabeth Ali Khan, aged 58 years,
R/o. Lakdikapul, Hyderabad.

6. The United Minority Front
Rep. by its Secretary Mr. Zafar Javeed
S/o. Late S.M. Amjad Ali Khan,
Aged 45 years, R/o. Basheerbagh, Hyderabad.

.....RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to declare the impugned G.O.Ms.No. 33 Backward Classes Welfare (C2) Department dt.12-7-2004 issued by the 1st respondent identifying Muslims as Backward Classes in the State and consequentially providing 5% reservations in educational institutions and employment in the State treating Muslims as Backward Class under category E in addition to the existing ABCD categories, as arbitrary, illegal being contrary to the provisions of A.P. Commission for Backward Classes Act, 1993, and unconstitutional being contrary to the principles of law governing Article 15(4) and Article 16(4) of the Constitution of India by way of issue of a writ, order or direction, one more particularly in the nature of Writ of Mandamus and issue a consequential direction to the
1st respondent not to revise the lists of Backward Classes by inclusion of new backward classes in the existing list of Backward Classes in the State except in accordance with the provisions of A.P. Commission for Backward Classes Act, 1993 and not to provide for reservations exceeding 50% in the State of A.P.

Counsel for the Petitioner: MR.D.V.Sitharam Murthy, Senior counsel for Mr.P.SUBASH

Counsel for the Respondent No.1. The Advocate General

Counsel for Respondent No.2: Mr.K.R.Prabhaker

Counsel for Respondent Nos.3, 5 &6: Mr.Noushad Ali

Counsel for Respondent No,4: Mr.S.M.Subhan

WRIT PETITION NO : 12744 of 2004

Between:

1 P. Rohan, S/o Sri P. Mahipal Reddy,
Rep. by natural guardian and mother
Smt. J. Ramadevi W/o P. Mahipal Reddy,
aged 40 yrs, housewife, R/o.H.No. 1-118,
Besides Srirama Grameena Bank,
Mubaraknagar, Nizamabad.

2 P. Avinash Reddy, S/o Sri P. Padmanabha Reddy,
Rep. by his father and natural guardian
Sri P. Padmanabha Reddy, S/o Sri Narasimha Reddy,
aged 46 years, R/o Pragathi Surgical Clinic,
Opp. Lalitha Talkies, Miryalaguda, Nalgonda District.

..... PETITIONERS

AND

1 The N.T.R. University of Sciences, Vijayawada,
Rep. by its Registrar.

2 The Convenor, EAMCET-2004,
J.N.T.U. Masab Tank, Hyderabad.

3 The Government of Andhra Pradesh,
Rep. by its Principal Secretary to Government,
Medical and Health Department,
A.P. Secretariat, Hyderabad.

4 The Government of Andhra Pradesh,
Rep. by its Principal Secretary to Government,
Backward Classes Welfare (C2) Department,
A.P. Secretariat, Hyderabad.

5. Akbaruddin Owaisi S/o. Sultan Salauddin Owaisi,
Indian, aged about 35 years, R/o. Hyderabad.

...RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ, order or direction more particularly one in the nature of a Writ of Mandamus declaring the action of the respondents in not filling up of 5% of seats in 1st year MBBS/BDS courses in OC category for the academic year 2004-05 and setting part the same for Muslim Minorities as per G.O.Ms.No. 33, B.C. Welfare (C2) Department, dt.12-7-2004 as arbitrary and illegal and consequently direct the respondents to fill up 5% of the seats in 1st year MBBS/BDS course for the academic year 2004-05 with OC candidates and further declare that G.O.Ms.No. 33, BC Welfare (C2) Dept, dt. 12-7-2004 is not applicable for admissions for the academic year 2004-05.

Counsel for the Petitioner:MR.S.SATYAM REDDY

Counsel for the Respondent No.1: SMT.Y.PADMAVATHI, Standing Counsel for NTR University

Counsel for Respondent No.2: Standing counsel for JNTU

Counsel for Respondent No. 3&4: The Advocate General

Counsel for Respondent No.5: R.V.Chalapathi

WRIT PETITION NO : 13059 of 2004

Between:

A. Bala Krishna Rao, S/o. Ranganatha Rao,
R/o. Yogeswara Aparments, Badichowdi,
Hyderabad - 27.

..... PETITIONER

AND

1 Government of Andhra Pradesh,
Rep. by its Secretary,
Secretariat, Hyderabad.

2 Government of Andhra Pradesh,
Backward Class Welfare Department,
Rep. by its Principal Secretary,
Secretariat, Hyderabad.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ, order or direction, more particularly in the nature of writ of mandamus declaring the G.O. Ms. No. 33, dated 12-07-2004 Backward Classes Welfare (C-2) Department, dt. 12-07-2004 as illegal and to struck down the same.

Counsel for the Petitioner: MR.A.VENKATESWARA SARMA

Counsel for the Respondent Nos: The Advocate General

WRIT PETITION NO : 13073 of 2004

Between:

Asaduddin Owaisi, S/o Sultan Salauddin Owaisi,
Hyderabad Parliamentary Constituency,
R/o Old City, Hyderabad, Andhra Pradesh

..... PETITIONER

AND

1 The Government of Andhra Pradesh,
Rep.by its Prl.Secretary, Gen.Admn.Dept.
Secretariat Buildings, Saifabad, Hyderabad.

2 The Government of Andhra Pradesh
Rep. by its Prl. Secretary to Govt.
Backward Classes Welfare Dept. Secretariat Buildings,
Saifabad, Hyderabad.

3. B. Linga Reddy S/o. B. Subba Reddy
aged about 23 years, Student,
R/o. Veerapuram Village,
Kothapally Mandal, Kurnool District.

.....RESPONDENT(S)

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate Writ, Order or direction, more particularly, one in the nature of Writ of Mandamus, declaring Section 11(2) A.P. Commission for Backward Classes Act, 1993 is illegal, unjust, arbitrary, amounting to colourable exercise of power, thereby violative of Articles 14,15, 16, 162 and 340 of the Constitution of India as un-constitutional and issue the consequential directions to specifically proceed with reservations in favour of Muslim minorities as provided in G.O.Ms.No.33, dated 12/7/2004 without having to wait for the consultation process as provided under Sections 11(2) of the A.P. Commission of Backward Classes Act, 1993.

Counsel for the Petitioner: MR. K.R. PRABHAKAR

Counsel for the Respondent Nos 1 & 2.: Advocate General

GP FOR SOCIAL WELFARE Mr.V.Ramakrishna Reddy for R3

WRIT PETITION NO : 13113 of 2004

Between:

B. Linga Reddy, S/o. b. Subba Reddy
Veerapuram Village, Kothapally Mandal, Kurnool District.

..... PETITIONER

AND

1. The State of A.P.,
Rep. by its Prl. Secretary to Govt.,
Back Ward Classess Welfare Dept.,
Secretariat , Hyderabad.

2. Sri Asaduddin Owaisi, S/o Sultan Salauddin Owaisi
Aged about 35 years, Member of Parliament, Hyderabad,
Parliamentary Constituency, R/o.Old City, Hyderabad.

3. The Government of Andhra Pradesh, rep. by its Principal Secretary, General Administration Department, Secretariat Buildings, Secretariat, Hyd.

..RESPONDENTs

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to declare the impugned G.O.Ms.No.33 Backward Classes Welfare (C2) Dept., Dt. 12.7.2004 issued by the 1st respondent identifying Muslims as Backward Classes in the State and Consequentially providing 5% reservations in educational institutions and employment in the State Treating Muslims as Backward Classes under category E in addition to the existing ABCD categories as arbitrary, illegal being contrary to the provisions of A.P. Commission for Backward Classes Act, 1993, and unconstitutional being contrary to the principles of law governing Article 14 (4) and Article 16(4) of the Constitution of India by way of issue of a writ, order or direction, one more particularly in the nature of Writ of Mandamus and issue a consequential direction to the 1st respondent not to revise the lists of Backward Classes by inclusion of new backward classes in the existing list of Backward Classes in the State except in accordance with the provisions of A.P. Commission for Backward Classes Act, 1993 and not to provide for reservations exceeding 50% in the State of A.P.

Counsel for the Petitioner: MR.V.RAMAKRISHNA REDDY

Counsel for the Respondent Nos 1&3: The Advocate General

Counsel for Respondent No.2: None

The Court made the following Common Judgment :

JUDGMENT: B. SUDERSHAN REDDY, J *(for A. Gopal Reddy and K.C. Bhanu, JJ and himself).*

Several of the most devisive moral conflicts that have beset us Indians, in the period, since the dawn of independence have been transmuted into constitutional conflicts – conflicts what the Constitution of India forbids – and resolved as such. The most prominent instances include the conflicts over Federalism, Secularism, sex-based discrimination and affirmative action. The conflicts over affirmative action programme occupy a large space.

2. The great bulk of constitutional litigation concerns State enactments and nearly all of that litigation purports to be based on a single sentence of Article 14 and, indeed, on one or the other of two pairs of words, "equality before the law" and "equal protection of the laws". If the Constitution is the embodiment of our aspirations, it must have become so very largely because of those two pairs of words. Each is a protection with centuries of history behind it, often dearly bought with the blood and lives of people determined to prevent oppression by their rulers.

3. When the Supreme Court revisited the question of whether and under what circumstances the State may engage in affirmative action in **Indra Sawhney & Others v. Union of India & Others**[1], what is popularly known as Mandal Commission case, which is considered to be a great and comprehensive work of learning and scholarship on the question of reservations in favour of vulnerable sections of the society, it was perceived to have had provided final solution to the problems arising in that regard. Significant progress has been made on both the constitutional and philosophical fronts, as various issues have been significantly clarified and diverse position given cogent articulation.
Yet, the debate over affirmative action has recently intensified, with advocates and foes as bitterly divided as ever.

4. This debate on reservations involves complex and sensitive issues. No doubt a great deal has already been said, much of it on merit and on point. That occasion had arisen once again and the issue is presented for consideration before the Court vested with the power of judicial review. The modern activist State is a concomitant of the complexity of modern society; it is inevitably with us. We must meet the challenge rather than wish it were not before us.

5. It is apt to recall the following observations of **Sawant, J** in Indra Sawhney's case (1 supra):

> "In a legal system where the Courts are vested with the power of judicial review, on occasions issues with social, political and economic overtones come up for consideration. They are commonly known as political questions. Some of them are of transient importance while others have portentous consequences for generations to come. More often than not such issues are emotionally hypercharged and raise a storm of controversy in the society. Reason and rationalism become the first casualties, and sentiments run high. The Courts have, however, as a part of their obligatory duty, to decide them. While dealing with them the courts have to raise the issues above the contemporary dust and din, and examine them dispassionately, keeping in view, the long term interests of the society as a whole. Such problems cannot always be answered by the strict rules of logic. Social realities which have their own logic have also their role to play in resolving them. The present is an issue of the kind."

A word about the Constitutional logic of Reservations:

6. The problem of reservational protective discrimination is multi-dimensional involving formidable burdens of "policy-making and administration in a developing nation"[2].

7. One of the most treasured liberties provided in the Constitution, and perhaps the liberty that sets the India apart from many third world countries, is 'equality under the law' and 'equal protection of the laws'. This principle is enshrined in the trinity of Articles 14, 15 & 16 of the Constitution of India. Equality is not an amorphous concept that exists in the minds of dreamers and scholars, but a real and significant liberty affecting our everyday lives as citizens of this great country. There have been

times in our history when equality, although sought, was not realized by all citizens.

8. Equality is an important component of part of Justice which all political systems governed by rule of law and constitutionalism, aspire to secure. It is an essential and indispensable ingredient of government of laws. Ours is the government of laws and not of men. Article 14 specifically rules that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Articles 15 and 16 illustrate the ways to give concrete shape to the right of equality. Article 15(1) provides that "the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them' and Clause (2) of this Article prohibits on these grounds, subjection to any disability, liability, restriction or condition with regard to "access to shops, public restaurants, hotels and places of public entertainment, or "the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public". Article 16(1) ensures equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and Clause (2) of this Article prohibits discrimination in matters of such employment against any citizen only on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them. Like-wise Article 29(2) prohibits denial of admissions into any educational institutions maintained or aided out of the State funds on grounds only of religion, race, caste, language or any of them. These provisions speak of equality in principle and inspire the constitutional dealing on the basis of religion blind, caste blind, race blind, sex blind principles. But these provisions present one side of the principle of equality, i.e., like should be treated alike.

9. The other side of equality is that 'it is in fact a protest against unjust, undeserved and unjustified inequalities.' "It is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallized privileges" (See: **State of Kerala v. N.M. Thomas**[3]. Where inequality is rampant due to historical reasons, Justice demands unequal treatment of unequal people and where people are depressed and socially disadvantaged special positive governmental care is needed to enable such people to compete with the rest of the people[4]. The non-positive action of the government would result into perpetuation of inequality already prevalent in society. The positive preferential treatment of the depressed classes or the weaker sections of society is called by different names like, protective discrimination or reverse discrimination or compensatory discrimination, benign discrimination, affirmative action and so on. The term 'protective discrimination' denotes the idea that the object of special or preferential treatment is not so much to give any special privileges as to extend protection to those who have been exploited due to centuries of oppression and ill treatment and but for the special treatment are vulnerable to exploitation.

10. Affirmative action is justified, not because those who are given preference are entitled to an advantage, whether in compensation for past discrimination or for any other reason, but simply because "helping them is now an effective way of attacking a national problem"[5].

11. V.R. Krishna Iyer, J. once observed - "the unanimity among the leading statesmen, jurists, sociologists, constitutional law scholars and thinktanks that the constitutional protection of the weaker sections in India was an indispensable desideratum and the *modus operandi* is socio-legal engineering geared to the national objective".

12. Dr. Ambedkar observed – "Political democracy cannot succeed where there is no social and economic democracy. Social and economic democracy are the tissue and the fibre of a political democracy. The tougher the tissue and the fibre, the greater the strength of the body politic."

13. The equality of social status can never be achieved unless there is a reasonable representation of those segments of society, who have been kept out of power since time immemorial, in its power generating structures.

14. One mode to bring equality in the society is to rearrange the material resources as well as human forces. That not only the relations for production must change but the human forces also must be reorganized to ensure equality of opportunities.

Reservations are part of this scheme.

15. The essence of the policy of reservation in public employment lies in the fact that in a caste ridden society, the control over bureaucratic structure by only some castes creates distorted authority in society. The access to and the control over public institutions convert effective powers over the material resources, political authority and finally over the well being and life chances of those who are out of power structure. "A network of jobs consisting of a network of upper and allied castes can ensure the power of life and death over a whole host of lesser castes and hold the latter down on their knees for all time"[6].

16. Unless the authority generating jobs are distributed over the entire social landscape, equality of opportunity remains a teasing illusion.

17. Modern education is the passport to enter into public employment. The octopus grip and control over the educational institutions has remained the initial road block for lower caste communities to enter into it. The objective of broad based government jobs can never be realised unless their entry into modern educational institutions is safeguarded.

18. This in essence is the philosophy behind reservations. Dr. B.R. Ambedkar and Ram Manoher Lohia, the great visionaries suggest this line of approach with foresight and determination. They were of the view that new India with values of democracy and socialism could not be built unless there were deliberate attempts to reorganize the power generating structures in society. Social equality cannot be achieved by relying on an uninterrupted race between privileged and under-privileged.

19. Lohia said:

> "Caste restricts opportunity. Where caste prevails, opportunity and ability are restricted to ever-narrowing circles of the people, equal opportunity can further widen the gulf. Groups whom centuries have made able are in a position to make near-monopolistic use of equal opportunity. India's experience is conclusive proof that caste turns a country into the arid deserts of intellectual inadequacy"[7].

20. The goal of Constitution is the attainment of social equality. Indian Society which is basically caste ridden never had the opportunity to organize and structure itself on the basis of equality even in the formal sense. The need of hour is to structure the society in a way leading to the goal of social equality. Social equality cannot be decisively achieved only by eradicating economic inequality. Social justice demands fair and equitable distribution of authority, income and status.

21. What is needed to make social equality a reality is to base on equality of results. The implicit concern for social equality is "that the social order is not to establish and secure the more attractive prospects of those better off unless doing so, to the advantage of those less fortunate."[8]

22. "Social equality in a democratic society requires that people should not only have equal political right but also must have equal social status. This cannot be brought about by free play of forces in society, a framework capable of perpetuating inequality."[9]

23. This philosophy of reservations is enshrined and inherent in Articles 14, 15 & 16 of the Constitution of India.

Brief history of the reservations in favour of the backward classes:

24. The First Backward Class Commission was set up by a Presidential Order under Article 340 of the Constitution of India on 29th January, 1953, known as **Kaka Kalelkar Commission,** to determine the criteria to be adopted in considering whether any sections of the people in the territory of India (in addition to the Scheduled Castes and Scheduled Tribes specified by notifications issued under Articles 341 and 342 of the Constitution) should be treated as socially and educationally backward classes; and, in accordance with such criteria, prepare a list of such classes setting out also their approximate numbers and

their territorial distribution; investigate the conditions of all such socially and educationally backward classes and the difficulties under which they labour. The Commission submitted its report on 30th March, 1955. It prepared a list of 2399 backward castes or communities for the entire country and 837 of these were classified as 'most backward'. The Commission made wide-ranging and comprehensive recommendations for upliftment of the backward classes. After a detailed examination of the Commission's Report, the Government laid its copy together with a Memorandum of action taken before each House of the Parliament on September 3rd, 1956, in compliance with Article 340(3) of the Constitution.

25. The Central Government ultimately took a decision that no all India list of backward classes should be drawn up, nor any reservation be made in the Central Government Service for any group of backward classes other than the Scheduled Castes and Scheduled Tribes. Consequently, on 14th August, 1961, the Ministry of Home Affairs addressed all the State Governments stating, "While the State Governments have the discretion to choose their own criteria for defining backwardness, in the view of the Government of India it would be better to apply economic tests than to go by caste." Regarding the preparation of backward classes list, it was observed, "even if the Central Government were to specify under Article 338(3) certain groups of people as belonging to 'other backward classes', it will still be open to every State Government to draw up its own lists for the purposes of Articles 15 and 16. As, therefore, the State Governments may adhere to their own lists, any all-India list drawn up by the Central Government would have no practical utility".

26. The Government of Andhra Pradesh specified 139 castes as socially and educationally backward classes in G.O. Ms. No.1886 dated 21-06-1963 for the purposes of selecting candidates to seats reserved for backward classes in medical colleges in the State. The list was quashed by this Court in

P. Sukhadev v. The Government of Andhra Pradesh[10] on the ground that the enumeration of backward classes has been made exclusively on the basis of castes.

27. Once again the Government prepared a list of 112 communities considered as socially and educationally backward, and notified them in G.O. Ms. No.1880, dated
29-07-1966 providing reservations both in professional colleges as well as Government services. The Supreme Court in **State of Andhra Pradesh & another v. P. Sagar**[11] struck down the G.O. on the ground that the list prepared was expressly based on caste and community without taking into consideration, the criteria which had been adopted by the Courts for determining who the socially and educationally backward classes of the society are. The Court was of the opinion that no proper investigation was done nor any material data was collected before classifying the persons employed in the Government Order as backward.

28. Thereafter the Government of Andhra Pradesh by
G.O. Ms. No.870, Education, dated 12-04-1968, appointed a Commission of Inquiry under the Commissions of Inquiry Act, 1952, for the purpose of determining the criteria to be adopted in considering whether any sections of citizens of India in the State of Andhra Pradesh (other than the Scheduled Castes and Scheduled Tribes) may be treated as socially and educationally backward classes and in accordance with such criteria to prepare a list of such backward classes setting out also their approximate numbers and their territorial distribution; to investigate the conditions of all such socially and educationally backward classes and the difficulties under which they labour; and make recommendations as to special provisions which may be made by the Government for their advancement and for promotion of their educational and economic interests, generally and with particular reference to the reservation of seats in educational institutions maintained by the State or receiving aid out of the State funds and the reservation of appointments in favour of such backward classes; the percentage of proportion of such reservation and the period during which such reservation may be made. This Commission was popularly known as

Anantharaman Commission (for short 'A.R. Commission'). The A.R. Commission submitted its report on 20th June, 1970. The A.R. Commission drew up a list of 93 classes classifying them as socially and educationally backward classes and recommended reservation of 30% of seats in professional colleges and similar percentage of posts in Government services in their favour. The Government after an elaborate consideration of the matter accepted the recommendations of the A.R. Commission and issued G.O. Ms. No.1793, dated 23rd September, 1970. The Government, however, limited the quota of reservations to 25% both in educational institutions as also services. The A.R. Commission made an in-depth study and analysis of the general principles indicated by the High Courts and the Supreme Court, for ascertainment of social and educational backwardness and to determine for itself, the test of criteria and as to what factors should be taken into account for determining (a) social backwardness and (b) educational backwardness.

29. The Commission provided an opportunity to each individual, association and organisation who desired to do so, to express their point of view in the matter and accordingly issued a questionnaire suggesting criteria for backwardness with a view to restrict the freedom of those who should send their replies but to show them the many ways in which the source of backwardness can be investigated. Many representations were received. It had also taken into consideration the criteria, which the other State Governments have laid down for determining the backwardness of classes of citizens based on the recommendations made by the backward classes commission appointed by them.

30. That after an elaborate consideration of the objections/ representations/suggestions made by the interested persons and the evidence collected by it, the A.R. Commission concluded that the following criteria should be adopted for ascertaining the social backwardness:-

(1) the general poverty of the class or community as a whole;
(2) occupation pursued by the classes of citizens the nature of which must be inferior or unclean or undignified and unremunerative or one which does not carry influence or power; and
(3) Caste in relation to Hindus.

31. That as regards the educational criteria for identifying the backward classes, the A.R. Commission had adopted the formula that the community whose student population in X and XI standards is well below the State average are educationally backward. In the process, the A.R. Commission ascertained figures from 50% of schools, which were projected proportionately with reference to the total student population in the X and XI classes for the State as a whole.

32. The A.R Commission received a number of representations from several Muslim organizations and also from individual Muslims urging for inclusion of certain sub-sects of Muslims in the list of backward classes. One Member of the Legislative Assembly claimed that 90% of the Muslims are backward in the real sense and therefore, the entire Muslim community should be classified as backward. Another representative who at the relevant time was a Member of the Legislative Assembly pleaded that Muslims, all over the India, are socially and educationally backward, and therefore, they should be classified as socially and educationally backward classes. The A.R. Commission having considered the said representations found that the Muslims as a class in this State are not socially and educationally backward since "all Muslims drawn from any stock of community are treated as equal. The traditional distinction never existed among the Muslims, some families are continuing the occupation chosen by their ancestors and they are usually called by their trade name like Dudekula, Kasab, Darzi, Momin, Mochi etc. ..... gradually, however, due to historical and other reasons, the sense of high and low has permeated the Muslim society also. Certain occupations have come to be regarded as inferior even among the Muslims and today there are a few distinct classes among Muslims who are suffering from social inferiority due to occupation and poverty. Therefore, social backwardness among the Muslims has to be determined with reference to their hereditary occupation and poverty and without reference to caste". Applying the said test

and criteria, the A.R. Commission considered the following two classes of Muslims as socially and educationally backward viz., (a) *Mehtar* (*Scavenger*), and (b) *Dudekula* (*Laddaf, pinjari or Noorbash*). The A.R. Commission found that most of these Muslims are converts from lower caste. Their traditional occupation was cotton-ginning, making of beds, pillows, nawar-weaving etc. This community among the Muslims is looked down even by other sections of Muslims and is educationally backward. The A.R. Commission accordingly found that their case merits inclusion in the backward classes.

33. The validity of G.O. Ms. No. 1793, dated 23rd September, 1970, once again became the subject matter of challenge ultimately culminating into the decision of the Supreme Court in **The State of Andhra Pradesh & Others v. U.S.V. Balram**[12]**.**

34. The Supreme Court found that the relevant data and material referred to in the report of the A.R. Commission justified its conclusion. The Supreme Court noted with satisfaction that the A.R Commission toured the various areas and visited huts and habitations of people to find out their actual conditions. There was nothing wrong in the A.R. Commission utilizing the personal impressions gathered to augment the various other materials gathered as a result of detailed investigation. The Supreme Court upheld the criteria adopted by the A.R. Commission for the purpose of characterising a particular caste/group as a socially and educationally backward class. The criteria adopted for identifying the backward classes was found to be in conformity with the test enunciated by the Supreme Court in **M.R. Balaji v. State of Mysore**[13].

35. The President of India in exercise of the powers conferred under Article 340 of the Constitution of India appointed another Backward Classes Commission, known as **Mandal Commission** for the very same purpose as **Kaka Kalelkar Commission** to investigate the conditions of socially and educationally backward classes within the territory of India. The terms of the reference of the Mandal Commission were:-

(i) to determine the criteria for defining the socially and educationally backward classes;

(ii) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;

(iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State; and

(iv) present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

36. The Mandal Commission submitted its report on 31st December, 1980.

37. It is unnecessary to burden this judgment with many a details as to the nature of investigation undertaken by the Mandal Commission. However, it is required to notice that the Commission collected voluminous evidence from the members of the general public, voluntary organisations, social workers, politicians, legislators etc. The Commission also toured the country, extensively held meetings at State and District Head Quarters and interior villages to get representations and hear views of as many people as possible. The evidence collected has been grouped into various sections.

38. The Mandal Commission evolved eleven 'Indicators' or 'criteria' for determining social and educational backwardness. These eleven indicators were grouped under three broad heads, i.e., Social, Educational and Economic; they are :-

A. *Social:*

(i) Castes/Classes considered as socially backward by others.

(ii) Castes/Classes which mainly depend on manual labour for their livelihood.

(iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.

(iv) Castes/Classes where participation of females in work is at least 25% above the State average.

B. *Educational:*

(v) Castes/Classes where the number of children in the age group of 5 – 15 years who never attended school is at least 25% above the State average.

(vi) Castes/Classes where the rate of student drop-out in the age group of 5 – 15 years is at least 25% above the State average.

(vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

C. Economic:

(viii) Castes/Classes where the average value of family assets is at least 25% below the State average.

(ix) Castes/Classes where the number of families living in Kuccha houses is at least 25% above the State average.

(x) Castes/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households.

(xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.

39. The Mandal Commission having noted that social and educational backwardness among non-Hindu communities is more or less of the same order as among Hindu communities, evolved the following rough and ready criteria for identifying non-Hindu OBCs:-

(i) All untouchables converted to any non-Hindu religion; and

(ii) Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Examples: Dhobi, Teli, Dheemar, Nai, Gujar Kumhar, Lohar, Darji, Badhai, etc.).

40. It is unnecessary to notice further details in this regard.

41. That another important development in this regard in the State of Andhra Pradesh, which may have a bearing on the issues that arise for consideration before us may have to be noted. The State Minorities Commission recommended to the Government of Andhra Pradesh that certain weaker sections among the Minorities whose income was below Rs.8,000/- per annum should also be included in the list of backward classes. The said Commission noted that only two groups among Muslims viz., "(a) *Mehtar* and (b) *Dudekula*" were included in the list of backward classes, and not others, with the result the persons not so included were not in a position to seek help from the A.P. Backward Classes Co-operative Finance Corporation Limited. The Government took up the matter for consideration and sought the opinion of its Law Department and the learned Advocate General. The Government was advised that according to the report of the A.R Commission, the Muslims as such cannot be included among the backward classes and the whole of the community as a group cannot be included among the backward classes; that would be including a group on the basis of religion and a ground not permissible in law.

42. The matter was placed before the Council of Ministers on 01-06-1981 to consider two questions viz., (a) inclusion of minorities in the list of Backward Classes; and (b) the constitution of a Finance Corporation for the minorities. A Sub-Committee of the Council of Ministers was constituted to examine the questions.

43. The recommendations made by the Cabinet Sub-Committee were considered by the Cabinet on 16-08-1981 and it was "resolved to constitute a Commission to review the A.P. Backward Classes Commission's Report, 1970, for the purpose of determining the socially and educationally backward classes for the purpose of Article 15(4) and 16(4) of the Constitution of India and to examine the inclusion in the list of Backward Classes of any other communities/castes including

minorities".

44. Accordingly, the Government in exercise of the powers conferred under Section 3 of the Commission of Inquiry Act, 1952 (Central Act 60 of 1962), constituted the One-Man Commission known as Muralidhara Rao Commission (for short 'M.R. Commission').

45. The terms of reference were:-

> i) Review the recommendations made by the Andhra Pradesh Backward Classes Commission, 1970 and the implementation thereof for the purpose of determining the need to continue the existing special provisions in their favour under Articles 15(4) and 16(4) of the Constitution of India, and to review the existing list of Backward Classes in the light of the social and educational progress achieved by these classes;
>
> ii) Examine the social and educational backwardness of minority communities for the purpose of including them within the purview of the Backward classes of citizens under Articles 15(4) and 16(4) of the Constitution of India;
>
> iii) Present its report to the Government within a period of three months from the date on which it commences its enquiry……"

46. The M.R. Commission submitted its report on

25-09-1982.

47. The M.R. Commission recommended the continuance of "the Muslim sects already included in the list of backward classes as backward classes except '*Mehtar*(Muslims)' who were already included in the list of Scheduled Castes". In addition, the M.R Commission recommended inclusion of another Muslim sect namely '*Qureshi* (Muslim butchers)' community in the list of backward classes on the ground that their social status is on par with '*Are-Katika'* and '*Katika'* whose profession is also butchering even though they belong to a different religion, namely Hinduism. There is no difference at all from the point of view of social status and educational backwardness between the two communities. The Commission emphatically found "except few Muslim sects already included in the Backward Class list and the Muslim butchers who are proposed for inclusion now, the other sects among the Muslims are enjoying equal social status and therefore there is no social backwardness among them …….. For any class of citizens to be treated as Backward Classes, they should satisfy the twin criteria of social and educational backwardness as indicated in Article 15 (4) of the Constitution of India. Since there is no social backwardness among Muslims either in relation to various sects in their community or because of treatment by other religious groups like Hindus, Christians and Parsis, there is no legal justification for including all the Muslims in the list of Backward Classes". (emphasis added).

48. The other recommendations made by the M.R. Commission are not relevant for our present purpose.

49. The Government vide G.O. Ms. No.166, Social Welfare (P-Department), dated 15-07-1986 broadly accepted the report of the M.R. Commission, but, however, rejected its recommendations to delete '*Mehtar*(Muslims)' from the list of backward classes inasmuch as the said recommendations were based upon a mistake of fact. The report was accepted by the Government resulting in far reaching consequences. The validity of G.O. Ms. No.166 was attacked by both of those not included in any of the list of the backward classes as well as the members of the backward classes themselves, though on different grounds.

50. In **V. Narayana Rao v. State of A.P.**[14], which is relevant for our present purpose, a specific argument was also addressed so far as non-inclusion of Muslims in backward classes is concerned. It was contended that the M.R Commission was wrong in making a recommendation against inclusion of Muslims. The contention was that once certain professional groups, like barbers, washermen, fishermen, etc., among Hindus are included in backward classes, there is no reason why the groups among Muslims following the said professions also should not have been included. It was submitted that there were large number of rickshaw-pullers belonging to Muslim community in the city who are also socially and educationally backward

but who too have not been recommended to be included. This Court speaking through **Jeevan Reddy, J**(*as he then was*) observed**:**

> "In our opinion, the reasoning of the learned Counsel is unacceptable. Barbers, washermen and fishermen among Hindus constitute a homogeneous group a caste, which is also a class within the meaning of Art.15(4) the members where follow the particular profession generation after generation and as a matter of customary obligation; they constitute a homogeneous group identifiable by their profession, customs and practices. The same cannot be said of those following similar professions among Muslims. For that matter, any other Hindu belonging to forward classes may also choose to engage himself in any of the said professions but, for that reason he cannot be called a member of the homogeneous class of barbers, washermen, or fishermen, as the case may be. The link between the caste and profession does not exist among Muslims. Indeed, Islam does not recognize caste system at all, as pointed out by the Mandal Commission, though it may be that at the rural level, caste system has percolated to some extent into Muslims too. So far as "Dudekulas" and "Mehtars" among Muslims are concerned, who can be said to be attached to a particular profession, they have already been included in the list of Backward Classes. It is not brought to our notice that there is any other group which is situated similarly to "Dudekulas" and "Mehtars". So far as rickshaw-pullers in Hyderabad are concerned they are not confined to any one community. It may be that they are socially and educationally backward and require assistance, but in the absence of any representation by them, we cannot find fault with the M.R. Commission for not recommending their inclusion. True it is that the Commission could have made its own enquiries even though no representation as such had been made to it for there may be certain groups who may not even be aware of the appointment of such commission, or that they are expected to make representation."

51. The Court took the view that the Governmental Orders issued based on the report cannot be held to be bad on account of "non-inclusion of Muslims as such or any of the groups among Muslims in Backward Classes".

52. While the matter stood thus, the Supreme Court delivered its momentous judgment in **Indra Sawhney's case** (Supra 1) wherein it considered the constitutional validity of two memorandums issued by the Central Government providing 20% reservations to backward classes in central services on the basis of Mandal Commission Report. The Supreme Court issued series of directions to the Central Government as well as the State Governments. The Government of India, each of the State Governments, and the administration of Union territories were directed to constitute permanent bodies for entertaining, examining and recommending, upon request, for inclusion and complaints of over inclusion and under inclusion, in the list of other backward classes of citizens.

53. The Andhra Pradesh Commission for Backward Classes Act, 1993 (for short 'Act 20 of 1993') is the direct outcome of the judgment of the Supreme Court in **Indra Sawhney's case** (Supra 1). It is stated to be so, in the statement of objects and reasons, which is to the following effect:-

> "Supreme Court in its judgment delivered on 16-11-1992 on the question of reservation in appointments in Central Services/Posts for Backward Classes directed the Central and State Governments to set up permanent Backward Classes Commission for examining, considering and recommending the requests for inclusion and complaints of 'under-inclusion' and 'over inclusion' in the list of Backward Classes and to determine the economic criteria to exclude from the list of Backward Classes where such lists are already under operation.
>
> It has been decided to undertake a suitable legislation for constituting a Commission as per direction of Supreme Court to examine, consider and recommend the requests for inclusion and complaints of 'under inclusion' and 'over inclusion' in the list of Backward Classes and to examine any other matter relating to the B.Cs. that may be referred to it by the State Govt. from time to time.
>
> This Bill seeks to give effect to the above decision."

54. Act 20 of 1993 came into force with effect from

3rd December, 1993. The Government of Andhra Pradesh in exercise of the power conferred under Section 3 of Act 20 of 1993, constituted the Backward Classes Commission vide G.O. Ms. No.9, dated 26-01-1994. We shall notice the further details and the scheme of Act 20 of 1993 at a later stage.

55. On 25.8.1994, the Government issued G.O.Ms.No.30 Backward Classes Welfare (P.II) Department ordering Muslims, Kapus, Balijas and Telagas to be treated as socially and educationally backward classes of citizens for the purpose of reservation of seats in educational institutions and for recruitment to jobs in Government and local bodies. In the said G.O., the Government noted that on the directions of the Supreme Court, the Government of A.P. Constituted Act 20 of 1993; While

the Commission was examining the representations received from various communities for inclusion in the list of backward classes, there has been considerable unrest among the members of various castes and communities in support of the long pending demand for inclusion in the list of backward classes. The Government made a request to the Commission for an interim report in regard to the social and educational backwardness of those castes and communities but the Commission expressed its inability to do so. The Government noted that the demand of the castes and the communities referred to for inclusion in the list of backward classes is a long pending demand with a mass support sometimes even causing unrest, for the simple reason that certain communities which are more or less on par with them in the matter of social and educational backwardness have already been included in the list of backward classes.

56. The constitutional validity of G.O.Ms.No.30 dated 25.8.1994 has been challenged in the **A.P. State Backward Classes Welfare Association v. State of Andhra Pradesh Backward Classes Welfare Department**[15]. This Court having interpreted the G.O. found the same not as a final decision for providing reservations to the communities enlisted in the impugned G.O. It was held:

> " The G.O. can at best be treated as a requisition to the Commission to send a report as regards the reservation to the communities enlisted in the G.O. .....The impugned G.O. has not brought-in a situation where a revision as such is effected to the existing list, but simply an identification of different communities is made for being enlisted by the Commission. It is for the Commission to enlist such communities in its report in a recommendatory form to the Government for its acceptance. The Commission may or may not accept the identification made by the Government through the impugned G.O more so when there are petitions filed before the Commission - as was submitted – seeking non inclusion of the said communities in the list."

57. However, one of the learned Judges took slightly a different view and held that prior consultation with the Commission was mandatory for exclusion of any existing backward classes and as well as inclusion of any new backward classes in the list. In the view of the learned Judge, even piece-meal inclusion in the list of backward classes amounts to revising the list for which purposes prior consultation of the Commission under Section 11(2) of the Act is mandatory. The learned Judge accordingly held the G.O. to be subject to the report of the B.C. Commission and the same not to be given effect to until filing of such a report by the B.C. Commission. In view of the said judgment, Muslims and other communities mentioned in that G.O. were not added and included in the list of backward classes. The matter is stated to be under consideration of the B.C. Commission.

58. While the matter stood thus, a meeting of various Secretaries was held on 2.6.2004 by the Chief Secretary to the Government of A.P. to discuss the matter regarding reservations to the Muslim minorities. The following three issues were discussed in the said meeting.

1. Whether Muslim Community can be provided any reservations in employment and educational institutions on par with other backward classes in the State through an executive order.
2. Whether recommendations of any statutory commission are necessary for issuing an executive order for providing any reservation to Muslim Community on par with other B.Cs. in the State,
3. Whether the total reservations in the State could exceed 50% as the Supreme Court in its interim order in WP 438 of 1994 has stated that the total reservations in any State should not exceed 50%.

59. It was finally resolved to entrust the issue "to some Governmental organization/authority, preferably to the Commissionerate for Minorities Welfare headed by Ex-Officio Commissioner working under the administrative control of the Minorities Welfare Department to examine the

socio-economic and educational conditions among Muslim community by utilizing the material, if any, available with the Commissionerate or with any other Commission or by studying the issue further, if necessary, and to submit a report to the Government as to whether the socio-economic and educational conditions of Muslim community warrant reservations for them in employment and educational institutions on par with other B.Cs. in the State".

60. On 4.6.2004, the Government issued G.O.Ms.No.15 entrusting the work "relating to the study of socio-economic and educational conditions of Muslim community in the State to the Commissionerate of Minorities Welfare headed by the Ex-officio Commissioner to examine the social, economic and educational backwardness of Muslim community in the State for the purpose of including them within the purview of the backward classes of citizens under Articles 15(4) and 16(4) of the Constitution of India and present its report to the Government at an early date".

61. The Ex-officio Commissioner/Commissionerate of Minorities Welfare, who is none other than the Principal Secretary to the Government submitted its report to the Government on 5.7.2004 recommending to provide 5% reservations to "Muslim Minorities in employment, educational and other fields on par with the Backward Classes in the State."

IMPUGNED GOVERNMENTAL ORDER:

62. The Government having accepted the recommendations made by the Commissionerate of Minorities Welfare issued orders vide G.O.Ms.No.33 dated 12.7.2004 directing that Muslims in the State are to be provided with 5% reservations in educational institutions and employment in the State, over and above the reservations presently provided to the backward classes and be treated as backward class under category-E (in addition to the existing A.B.C.D categories)." All the departments of the Government were accordingly directed to make necessary amendments to the Rules and Regulations in that regard. It is that G.O. which is challenged in this batch of writ petitions on various grounds.

Summary of submissions and grounds of attack:

63. The validity of G.O.Ms.No.33 dated 12.7.2004 is attacked on various grounds. The following contentions are urged by Sarvasri K. Rama Krishna Reddy, D. Prakash Reddy, Ramesh Ranganathan and Sri D.V. Sitarama Murthy:

64. There is no investigation or enquiry or any proper attempt made by the Commissionerate of Minorities Welfare for identification of social and educational backwardness in Muslim minorities as per the law laid down by the Supreme Court in **Indra Sawhney's case (1 supra)**. The very process of identification by the Commissionerate of Minorities Welfare is without any application of mind. Neither the Government nor the Commissionerate indicated the criteria to be adopted for the purposes of identification of Muslims as socially and educationally backward. The report takes into consideration many irrelevant factors, which are not germane for the purpose of identification of any class as a backward class. The procedure adopted is in breach of the provisions of Articles 15(4) and 16(4) of the Constitution of India.

65. The report submitted by the Commissionerate of Minorities Welfare claiming to be the study of socio-economic conditions has completely failed to advert itself to the social conditions of Muslims which alone entitles them to claim social backwardness. This aspect of the matter has been completely ignored by the report. The previous investigation and the enquiry made by the A.R. Commission and the M.R Commission and their reports rejecting the claim of Muslim community as a whole to be included in the backward classes on the ground that the community is not socially backward had not been taken into consideration by the Commissionerate. There is no reference to the earlier reports and the material collected by the previous Commissions. The whole exercise undertaken by the Commissionerate of Minorities Welfare is an eye – wash resulting in a tailor made report facilitating the Government to give effect to its predetermined policy of providing reservations to Muslims in the State.

66. The Government has an obligation to consult the Backward Classes Commission constituted under the provisions of Act 20 of 1993 before revising the list of backward classes. Section 11(2) of the Act mandates the Government to consult the Commission while undertaking any revision of the list. Non-consultation with the Commission vitiates the decision.

67. Identification of the whole of the Muslim community as a backward class without excluding the creamy layer is bad in

law. Non-exclusion of the creamy layer would amount to discrimination and violation of Articles 14, 15(1), 15(4), 16(1) and 16(4) of the Constitution of India. Non-exclusion of the creamy layer resulting in inclusion of the forward classes in the backward classes would not only violate Articles 14 and 16(1) of the Constitution of India but also would be in breach of the basic structure of the Constitution.

68. The reservations made in favour of socially and educationally backward classes under Article 15(4) and in favour of backward classes under Article 16(4) of the Constitution of India should not normally exceed 50%. On account of the inclusion of the entire Muslim community into the list of backward classes, the total reservations would come up to impermissible limit of 55.75% and the reservations so made are to be struck down on that ground alone.

69. The learned Advocate General appearing for the State supported the legality and validity of the impugned G.O. providing reservations in favour of Muslims. He disputed the correctness of various contentions urged for and on behalf of the petitioners. The main thrust of the submission was that the provisions of Act 20 of 1993 have no application to the fact situation on hand. Section 11 of the Act comes into play whenever the Government undertakes to revise the list of the backward classes but not when a particular group is to be included in the list of backward classes. It was also contended that Section 11 is directory in its nature and not a mandatory one.

70. The Commissionerate of Minorities Welfare has taken into consideration the survey done through the District Minority Welfare Officers and the officials of the Andhra Pradesh Minorities Commission; the material gathered on record is sufficient to determine the whole of Muslim Community as a backward class. The power under Articles 15(4) and 16(4) to provide social reservations in favour of deserving classes vests in the State and that power can be exercised even in the absence of any report by a Commission/Committee. The State is entitled to rely on the material available with it to provide reservations. The sufficiency or otherwise of the material relied upon by the Government to determine a particular caste or group as a backward class cannot be gone into by this Court in exercise of its judicial review jurisdiction. The scope of judicial review in the matter of this nature is a limited one. Identification of a group or class as socially and educationally backward is a policy decision and the Courts normally do not interfere with the policy decisions of the State.

71. Sarvasri K.G. Kannabiran, Dr. Rajiv Dhawan,
S. Ramachandra Rao, M.R.K. Chowdary, Ghulam Yazdani,
S. Satyanarayana Prasad, P. Gangaiah Naidu, M.A Bari, Noushad Ali, C.V. Nagarjuna Reddy, K. Balagopal, S. Niranjan Reddy, B. Vijaysen Reddy and S.M. Subhan made submissions broadly supporting the impugned G.O. Their contentions are the following:

72. A caste, a community or even a religious group can be a class of citizens if they are found to be backward under Articles 15(4) and 16(4) of the Constitution, the State can make a special provision for the whole of the caste, religion or community. Identification of a class of citizens as backward class citizens is essentially the function of the Government and the scope of judicial review of such an exercise of identification is not akin to that of appellate or revisional jurisdiction.

73. Consultation with the Commission under Act 20 of 1993 is only for periodic revision of the list by the Government and this requirement of consultation cannot be insisted in case where State in exercise of its power conferred under Articles 15(4) and 16(4) of the Constitution takes steps for identification of any new backward classes for making special provisions in their favour.

74. It is urged that the Government having set up one expert body through Act 20 of 1993 had set up another expert body specifically for the minorities through the Andhra Pradesh State Minorities Commission Act, 1998 (for short 'Act 31 of 1998'), which is a special enactment and consultation with the body created under the provisions of the said Act satisfies the mandate

of the Supreme Court in **Indra Sawhney's case** (1 supra) and obviates the need to consult the Commission set up under Act 20 of 1993 when the reservations for the minorities is the question. It is alternatively submitted that the B.C Commission set up under Section 3 of Act 20 of 1993 is no longer in existence, its period not having been extended, therefore, the question of consulting a 'body', which is not in existence, does not arise.

75. Sri S. Satyanarayana Prasad and Sri Noushad Ali, the learned counsel contended that the scope of Act 20 of 1993 is limited in its operation and consultation, if any, by the State with the Commission is required only when the State intends to revise the list of backward classes prepared by the Government for the purpose of making provision for the reservation of appointments of posts; there is no requirement in law to consult the Commission in cases where the Government intends to identify any new caste/group as socially and educationally backward for the purposes of providing reservation to seats in educational institutions. It is thus submitted that the impugned G.O insofar as conferring the benefits under Article 15(4) does not suffer from any illegality for the reason of non-consultation in terms of Section 11(2) of Act 20 of 1993. The impugned G.O is severable at least to the extent of Article 15(4).

76. Some of the counsel contended that the Government of Andhra Pradesh has already consulted Justice Putta Swamy Commission for inclusion of Muslims in the list of Backward Classes and also sought for an interim report but the Commission did not respond and failed to discharge its duty in not tendering its opinion/advise; in such circumstances, the repository power to make social reservations need not wait interminably. Reliance was placed on the doctrine of necessity and the doctrine of *"Lex non cogit ad impossibilia"*.

77. It was further contended that the writ petitioners failed to discharge the burden of proof to show that the Muslims are not socially and educationally backward since no mala fides have been alleged and the facts and figures stated in the report submitted by the Commissionerate remain uncontroverted; no further enquiry is called for. The writ petitions are liable to be dismissed on the ground that the petitioners failed to discharge their onus.

78. Sri K.G. Kannabiran, learned senior counsel, had taken slightly a different stand. His submission was that providing reservations to seats in educational institutions and posts in government services is an aspect of principle of equality. One need not always go via Articles 15(4) and 16(4) of the Constitution for providing reservations and one can directly access Articles 15(1) and 16(1) for justification for providing reservations. The reservations meant in favour of Minorities, according to him, can be justified under Articles 15(1) and 16(1).

79. Sri Challa Sitaramaiah, learned Amicus Curiae, assisted the Court and made his submissions. The learned Amicus Curiae submitted that the impugned G.O does not satisfy the conditions laid down by the Supreme Court in **Indra Sawhney's** case (1 supra) for classifying the entire Muslim Community as backward class for the purposes of Articles 15(4) and 16(4) of the Constitution of India. The Government having constituted an expert body under Act 20 of 1993 with power coupled with the duty to advise, was bound to consult the Commission. The Government cannot take advantage of its own acts of omission and commission and plead any inability in complying with the mandatory provisions of Act 20 of 1993.

80. It was further submitted that the reservations cannot be made on the basis of religion or community and any such reservations made on the basis of religion, it becomes communal. In communities where there is no caste system, the authority entrusted with the task of identification should evolve a rational scientific method of identification of the backwardness in that community. The best method is occupation. Learned Amicus Curiae further submitted that the creamy layer ought to have been excluded before including the whole of the Muslim Community as a backward class.

81. On an analysis of the submissions made and contentions raised, the following questions arise for consideration:-

QUESTIONS:

1(a) What does the expression "socially and educationally backward classes" in Article 15(4) and the expression "backward class of citizens" in Article 16(4) mean?

1(b) Whether the Muslims as a group are entitled to affirmative action/social reservations within the constitutional dispensation?

2) Whether the backward classes can be identified on the basis and with reference to caste, if so, what is the criteria for identifying the non-Hindu communities as a backward class?

3) Whether the process of identification of Muslims as a group as "backward class of citizens" by the Commissionerate of Minorities Welfare is vitiated?

4) Whether Section 11(2) of Act 20 of 1993 is mandatory in its nature, if so, what are the consequences of non-compliance?

5) Whether the Creamy Layer is to be excluded in the course of identification of backward classes?

6) To what extent the social reservations can be made?

7) Whether the reservations in favour of Muslims is traceable to Articles 15(1) and 16(1) of the Constitution of India?

8) What are the parameters and extent of judicial review with regard to identification of backward classes and the percentage of reservations made for such classes?

82. We shall first take up the last question with regard to parameters of judicial review.

Question 8:

What are the parameters and extent of judicial review with regard to identification of backward classes and the percentage of reservations made for such classes?

Parameters of Judicial Review:

83. Some of the learned counsel on behalf of the interveners made repeated attempts to impress upon this Court that the impugned decision being policy formulation by the Government in its nature is not susceptible to be judicially reviewed and cannot be interfered with by this Court unless this Court sits in appeal over the decision. The State Government in its counter affidavit stated that the impugned G.O issued providing reservations is perfectly legal and valid as the State is fully empowered to take a decision for extending the benefit of reservations to the deserving class of citizens as applicable to all the backward class people. It is further submitted "that the sovereign function of the State in looking after the needs of its citizens is always available and the Constitution of India provides for the same".

84. It is the bounden duty of this Court to determine the validity of any action which infringes the fundamental rights of the citizens and whenever such question arises whether the action or the law which prima facie infringes guaranteed fundamental rights, the validity thereof has to be determined by the Court on materials placed before it. Mere assertion that the law or order was made after full consideration of the relevant evidence would not be enough to deprive this Court's jurisdiction to determine whether by making the order or law, a fundamental right has been infringed.

85. We are acutely conscious of the conceptual difference between the appeal and the review, which is so well established. Essentially, judicial review is concerned with the validity rather than merits; with the reasoning process rather than correctness of the decision that has been reached. Substitution of Court's opinion on the merits for that of the decision maker is impermissible in a judicial review proceeding. It is only in appeals, the Court substitutes its own decision on merits.

86. We are required to examine whether the identification of the Muslim Community as a backward class for the purposes of

Articles 15(4) and 16(4) of the Constitution was in accordance with law. That an attempt was made to contend that the decision of providing reservations in favour of any particular caste/group/class or citizens is based on the subjective satisfaction of the State Government which can be tested only on limited grounds. The confusion entertained in this regard is required to be cleared. The expression *"in the opinion of the State"* employed in Article 16(4) would mean, the formation of the opinion by the State, which is purely a subjective process. The formation of opinion cannot be challenged on the grounds of propriety, reasonableness and sufficiency "though such an opinion is required to be formed on the subjective satisfaction of the Government whether the identified 'backward class of citizens' are adequately represented or not in the services under the State. But for drawing such requisite satisfaction, the existence of circumstances relevant to the formation of opinion is a *sine qua non.* If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of Statute, or irrelevant and extraneous material then that opinion is challengeable". (see **Indra Sawhneys' case**, para 174).

87. Sawant, J observed:

> "judicial scrutiny would be available (i) if the criterion inconsistent with the provisions of Article 16 is applied for identifying the classes for whom the special or unequal benefit can be given under the said article; (ii) if the classes which are not entitled to the said benefit are wrongly included in or those which are entitled are wrongly excluded form the list of beneficiaries of the special provisions. In such cases, it is not either the entire exercise or the entire list which becomes invalid, so long as the tests applied for identification are correct and the inclusion or exclusion is only marginal; and (iii) if the percentage of reservations is either disproportionate or unreasonable so as to deny the equality of opportunity to the unreserved classes and obliterates Article 16(1). Whether the percentage is unreasonable or results in the obliteration of Article 16(1), so far as the unreserved classes are concerned, it will depend upon the facts and circumstances of each case, and no hard and fast rule of general application with regard to the percentage can be laid down for all the regions and for all times".

88. Jeevan Reddy, J specifically held that any determination of backwardness is not a subjective exercise nor a matter of subjective satisfaction. "As held herein – as also by earlier judgments – the exercise is an objective one. Certain objective social and other criteria have to be satisfied before any group or class of citizens could be treated as backward. If the executive includes, for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power." While adverting to the question as to the extent of judicial review in regard to the identification of backwardness and the percentage of reservations made for such class, it is observed that the acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. No doubt, the Court would normally extend due deference to the judgment and discretion of the executive in these matters. It is thus clear that the question whether the backward classes of citizens are not adequately represented in the services under the State alone is a matter within the subjective satisfaction of the State. The State is entitled to form its own opinion on the basis of the material it has in its possession already or it may gather such material through a Commission/Committee, person or authority. Even that opinion formed is not beyond the judicial scrutiny altogether. The scope and parameters of judicial review even with regard to the matters within the subjective satisfaction of the decision maker are clearly stated in more than one decision including the **Barium Chemicals Limited v. Company Law Board**[16]**.**

89. So far as the determination of backwardness is concerned, it is not a subjective exercise or a matter of subjective satisfaction. Objective social and other relevant criteria have to be satisfied before any caste/group or class of citizens could be treated as backward class.

90. The sum and substance of the law declared by the Supreme Court in **Indra Sawhney's case** (1 supra) as regards the extent of judicial review is concerned, it does not lay down any special principles of judicial review. The scope of judicial review is neither expanded nor limited. As long as the correct criterion for the identification of the backward class is applied, the conclusions reached cannot be questioned on the ground that some other valid criterion was also available for such identification. Such exercise would amount to substitution of the opinion for that of the authority concerned which is impermissible in law. This Court while judicially reviewing the decisions of the executive does not normally substitute its own

opinion for that of the decision maker. This, in our considered opinion, is the sum and substance of the law declared by the Supreme Court as regards the extent of judicial review.

91. It was however argued that the action of the Government in making provision for reservation of appointments or posts or seats in educational institutions in favour of any backward class of citizens is a matter of policy of the Government and therefore not amenable to judicial review.

92. The policy decisions of the executive do not enjoy any constitutional immunity. That any policy decision, which is inconsistent with the Constitution and the laws is susceptible to be judicially reviewed. If the policy decision is inconsistent with the laws or arbitrary or irrational or due to abuse of power, is liable to be struck down. The policy decision of the executive cannot be struck down by the Court in exercise of its judicial review power on the ground that an alternative, better and valid policy was also available for formulation of policy decision. Wisdom behind the policy decision cannot be judicially reviewed but the policy decisions *per se* as such do not enjoy any immunity from judicial review. The Court cannot substitute its own view for that of the State. The Court refrains itself to enter into the merits of any policy decision and does not undertake to judicial review such policy decision unless the policies so formulated themselves are unconstitutional. If two views are possible and the State takes one of it, it would not be amenable to judicial review on the ground that the other view, according to the court is the better view. In the process of testing a policy decision on the touch stone of constitutional provisions, the Court should avoid embarking on un-chartered ocean of public policy. We shall bear in mind the parameters of judicial review and proceed to consider the issues that arise for consideration.

93. The broad proposition canvassed that policy decisions can never be reviewed by this Court is constitutionally not correct and therefore not acceptable. The decisions reported in **Federation of Railway Officers Association and others vs. Union of India**[17]**; N.T.R. University of Health Sciences vs. G.Babu Rajendra Prasad**[18]**; Vijay Lakshmi vs. Punjab University** [19] do not support the broad proposition urged by some of the counsel appearing on behalf of the interveners.

Questions 1(a) & 1(b):

1(a) What does the expression "socially and educationally backward classes" in Article 15(4) and the expression "backward class of citizens" in Article 16(4) mean?

1(b) Whether the Muslims as a group are entitled to affirmative action/social reservations within the constitutional dispensation?

94. Article 15(4) of the Constitution enables the State to make special provision for the advancement of any socially and educationally backward class of citizens or for the scheduled castes and scheduled tribes. Like-wise, Article 16(4) of the Constitution enables the State to make provision for the reservations of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Article 15 had clause (4) inserted in it by the first amendment Act 1951 whereas Article 16 has remained unamended except for a minor amendment in clause (3). As amended, both Articles read as follows;

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –

a) access to shops, public restaurants, hotels and places of public entertainment; or

b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

3) Nothing in this article shall prevent the State from making any special provision for women and children.

4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

16. Equality of opportunity in matters of public employment

1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment.

4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

4A)Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State are not adequately represented in the services under the State.

4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

95. In **Indra Sawhney's case** (1 supra) it is held, Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of Articles 38, 39, 39-A, 41 and 46 in part-IV (Directive Principles of State Policy). It is authoritatively held that Article 16(4) is not an exception to Article 16(1). That Article 16(1), being a facet of the Doctrine of Equality enshrined in Article 14 permits reasonable classification, just as Article 14 does. Article 16(4) is an instance of classification. It is observed that "all the backward class of citizens are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that clause (4) of Article 16 is not an exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1)…… It is a provision, which must be read along with and in harmony to clause (1). Indeed, even without clause (4), it would have been permissible for the State to have evolved such a classification and make a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms." In our considered opinion, what applies to Article 16(4) is equally applicable to Article 15(4).

96. It is also held that clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of the "backward class of citizens". That no further classification or special treatment is permissible in their favour apart from or outside of clause (4) of Article 16. It is exhaustive of reservations in favour of backward classes alone but it is not exhaustive of the very concept of reservations. That reservations can be provided out-side Clause (4) i.e. under Clause (1) of Article 16 to redress a specific situation. In exceptional situations, further reservations, whatever may be provided under clause (1).

97. The expression "socially and educationally backward class of citizens" used in Clause (4) of Article 15 and the expression "backward class of citizens" employed in clause (4) of Article 16 are not defined in the constitution. The torturing question what does the expression "socially and educationally backward classes" in Article 15(4) and "backward class of citizens" in Article 16(4) signify and how should they be identified, engaged the attention of the Courts.

98. The Courts have been grappling with the problem over the years. **M.R. Balaji v. State of Mysore** (13 Supra) was a case arising under Article 15(4). The view expressed about Article 15(4) came to be accepted as equally good and valid for the purpose of Article 16(4) until the decision in Indra Sawhney's case (1 supra). The Supreme Court having examined the scheme of Article 15, the meaning of the expression 'socially and educationally backward class', the importance of caste in Hindu social structure observed:

> "Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens …... though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the caste themselves.
>
> … "Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognize castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Article 15(4). It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty to a very large extent……... It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens." (emphasis is of ours).

99. Social stratification has a unique place in the politico-social-economic analysis of Indian Society, which is considered to be the most stratified of all known civilized societies in human history. The caste system with its myriad form of super-ordination and subjugation, its many oppressive customs, is perhaps singularly responsible for conflicting this dubious distinction. The Indian society which is plural in its nature is so complex making it difficult to define what a "Backward Class" is.

100. **Chitralekha v. State of Mysore**[20] is again a case under Article 15(4) of the Constitution of India. The Mysore Government had by an order defined 'backward classes' on the basis of occupation and income, unrelated to caste. Certain percentage of seats in professional and technical institutions were reserved for them in addition to the reservations in favour of the Scheduled Castes and Scheduled Tribes. The reservations so made were attacked on the ground that the identification done without taking the caste into consideration was impermissible. The Supreme Court repelled the contention and held that the identification or classification of backward classes on the basis of occupation-cum-income, without reference to caste, is not bad and does not offend Article 15(4).

101. **P. Rajendran v. State of Madras**[21]**,** once again relates to specification of socially and educationally backward classes with reference to castes. It had also arisen under Article 15(4) wherein it was held that caste is also a class of citizens and that if a caste as a whole is socially and educationally backward, reservations can be made in favour of such a caste on the ground that it is a socially and educationally backward class within the meaning of Article 15(4).

102. **Peeriakaruppan v. State of Tamilnadu**[22], is again a case arising under Article 15. Following the decision in **P. Rajendran's case** (21 Supra), **Hegde, J,** held that there are numerous castes in this country, which are socially and educationally backward. Once the caste is recognized as socially and educationally backward, reservations can be made in accordance with Article 15(4).

103. In **State of A.P. v. U.S.V. Balram**(12 Supra), the Supreme Court once again upheld the identification made by the Andhra Pradesh Government on the basis of caste.

104. In **Janaki Prasad Parimoo v. State of J & K**[23], and **State of U.P. v. Pradip Tandon**[24] the Supreme Court took the view that poverty alone cannot be the basis for determining or identifying the social and educational backwardness.

105. **Sri E.S. Venkataramaiah, J** in **K.C. Vasanth Kumar v. State of Karnataka**[25], opined:

> "The examination of the question in the background of the Indian social conditions shows that the expression "backward classes" used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward".

106. In **Indra Sawhney's case** (1 Supra), the Supreme Court after referring to **P. Rajendran's case** (21 Supra) and **K.C. Vasanth Kumar's case** (25 Supra), found that the opinions expressed therein emphasise the integral connection between caste, occupation, poverty and social backwardness. "They recognize that in the Indian context, lower castes are and ought to be treated as backward classes. The decisions in **P. Rajendran's case** (21 supra) and **K.C. Vasanth Kumar's case** (25 supra) (opinions of Chinnappa Reddy and Venkataramaiah, JJ) constitute important milestones on the road to recognition of relevance and significance of caste in the context of Articles 16(4) and 15(4)."

107. In **Indra Sawhney's case** (1 Supra) it has been authoritatively held that the word "class" in Article 16(4), is not antithetical to "caste". A caste can be a class and can be taken as a backward class of citizens. "The word "class" in Article 16(4): is used in the sense of social class – and not in the sense it is understood in Marxist Jargon. That a caste is nothing but a social class – a socially homogenous class. It is also an occupational grouping, with this difference that its membership is hereditary. Thus a caste, which is socially backward, is a class within the meaning of Article 15(4) and 16(4) of the Constitution of India.

108. Non-Hindu religions like Islam, Christianity, and Sikh, do not recognize caste as such, but the existence of caste like social stratification among the Muslims is well recognized that in spite of egalitarian philosophy of Islam, which opposes all kinds of discriminations, almost all types of caste groups have emerged in the Muslims. The Muslims have developed different caste-groups at different places, but they call themselves as *Jamat or Biradari* and do not use the term *Jat or caste e.g.* Nadaf o r Mansoori Jamat or Biradari, but in actual practice, they possess practically all the traits of caste structure such as endogamy, stratification, occupational, monopoly, dress-code and their own different Mosques[26].

109. In **Indra Sawhney's case** (1 Surpa) while referring to the speeches of Dr. B.R. Ambedkar in the Constituent Assembly it was noted that through out his speech in the Constituent Assembly, he was using the word "communities" (and not 'castes') which expression includes not only the castes among the Hindus but several other groups. The word "*community*" is clearly wider than "caste" – and "backward communities" means not only the castes – wherever they may be found – but also other groups, classes and sections among the populace. That is why the expressions "castes" or "caste" were not used under Article 15(4) and 16(4) but the word "class" which includes all communities, other groups, classes and sections among the populace was used.

110. Therefore, sections/groups among the Muslim community or the Muslim community itself can be identified as a socially and educationally backward class for the purpose of Article 15(4) and as backward class of citizens for the purpose of Article 16(4) provided they satisfy the test of social backwardness.

111. Reservations for Muslims or sections/groups among them, in no manner militate against secularism, which is a part of the basic structure of the constitution. The concept of secularism is based on a benign neutrality to benefit all including religious groups and it seeks to advance "good" for all including religious groups. Articles 14, 15 and 16 enjoin upon the State to treat all its people equally irrespective of their religion, faith or belief. The State while discharging its constitutional obligation

cannot make any distinction between one group of citizens and other on the ground of religion, faith or belief. The religion, faith or belief of a person or group of persons is totally immaterial so far as the State action is concerned. The State cannot exclude from its consideration the demands, entitlements of any constitutional claimants on the ground of religion, faith or belief. Whether a group, caste or class is entitled to the benefit of affirmative action does not depend upon religion, faith or worship. **(See: Kesavananda Bharthi v. State of Kerala[27]; S.R. Bommai v. Union of India[28]; M. Ismail Faruqui v. Union of India[29]; and Ziyauddin Bukhari v. Mehra[30]).** We are in entire agreement with the submissions made by Dr. Rajeev Dhavan, in this regard.

Questions 2 & 3:

Q.2) Whether the backward classes can be identified on the basis and with reference to caste, if so, what is the criteria for identifying the non-Hindu communities as a backward class?

Q.3) Whether the process of identification of Muslims as a group as "backward class of citizens" by the Commissionerate of Minorities Welfare is vitiated?

112. In **Indra Sawhney's case** (1 Supra) dealing with the question of identification of backward classes of citizens, the Supreme Court observed that each and every situation cannot be visualized and answered and the same must be left to the appropriate authorities appointed to identify the backward classes.

113. The Supreme Court while recognizing that there is no law or other statutory instrument prescribing the methodology of identification observed that the ultimate idea is to survey the entire populace. One has to begin somewhere. Since the castes represent explicit identifiable social classes/groupings, more particularly when Article 16(4) ameliorates social backwardness, one can well begin with the caste.

114. The process of identification does not come to an end once certain castes are identified as backward classes. There may be variety of communities, groups, classes and denominations, which may as well qualify as backward classes of citizens. For example, Muslim community, as a whole, is found socially and educationally backward in the State of Karnataka as well as in the State of Kerala by their respective State Governments. Though the matter must be left to the appropriate authorities appointed to identify the backward classes, the basic requirement is, the authority so appointed should evolve the criteria of backwardness and apply the criteria so evolved to the caste/group/community in order to determine whether it qualifies as a backward class or not. Once it is found that such caste/group/community satisfy the criteria and qualify, what emerges is a backward class for the purposes of clause (4) of Article 16. It equally applies to socially and educationally backward classes for the purposes of clause (4) of Article 15. "The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region."

115. The Supreme Court broadly commended the approach and methodology adopted by Justice O. Chinnappa Reddy Commission, in this respect.

116. That a close analysis of the judgment of the Supreme Court in **Indra Sawhney's case** (1 Supra) reveals that the authority entrusted with the task of identifying backward classes is required to first evolve the criteria of backwardness. That criteria so evolved is to be applied to the caste or community like Muslim community and then determine whether that particular caste or community can be characterised as a backward class. The authority appointed to identify is free to adopt such

approach and procedure as it thinks fit and so long as the approach adopted by it is fair and adequate, the Courts may not interfere in the matter.

117. It is now well settled that the caste was always recognized as a social class/a socially homogeneous class. If a particular caste, as a whole is socially and educationally backward, reservations can be made in favour of such a caste on the ground that it is socially and educationally backward class. But that does not necessarily mean that the caste can be the sole consideration. But in some cases, social backwardness may readily be identifiable with reference to caste.

118. In case of non-Hindus, social backwardness cannot obviously be identified for the purpose of recognizing as a class on the basis of caste in the conventional sense known to Hindu society. In all such cases, the part played by the occupation, conventional belief and place of habitation coupled with poverty may play a dominant and significant role in determining the social backwardness. But in either case, identification of backward classes cannot be based solely and exclusively on the basis of caste.

119. The question that falls for consideration is, "Whether the Commissionerate of Minorities Welfare commissioned to "study the socio-economic conditions of Muslim minorities in the State" evolved any definite discernible criteria of backwardness?"

120. We have noted in detail the criteria evolved by the First Backward Classes Commission (Kaka Kalelkar Commission), the second Backward Classes Commission (Mandal Commission),A.R Commission and M.R.Commission. Each one of them evolved definite and discernable criteria of backwardness and applied the same to castes and other social groups in order to find out social and educational backwardness.

121. The Supreme Court broadly commended the approach adopted by the Backward Classes Commission (O. Chinnappa Reddy, J). The said Commission having posed to itself as to how to identify the socially and educationally backward classes observed that knowledge of cause and effect is not enough. Identification must be on a practical basis and not on theoretical basis; the practical basis must have reference to prevailing societal conditions and circumstances. That economical and cultural impoverishment together with social deprivation are what constitute social and educational backwardness and such group-impoverishment and

group-deprivation is what determines who socially and educationally backward classes are……the economic impoverishment may be judged by the level of poverty, cultural impoverishment may be judged by the low level of literacy and education and social deprivation may be judged by inferior status treatment. It is not economic impoverishment alone, nor cultural impoverishment only, nor social deprivation by itself that makes for social and educational backwardness, but the combination or the right brew of these factors. Caste, occupation and geography appear to be important identifying factors as distinguished from determinative elements. This was the criteria evolved for the purpose of identification of backward classes.

122. The report on hand, to say least, is somewhat peculiar. It does not refer to even the terms of reference and the purposes for which it has been commissioned. The Commissionerate was under the impression as if that it has been commissioned to study the social and economical conditions of Muslim minorities in the State. But it was actually commissioned to examine the social, economical and educational backwardness of Muslim community in the State for the purpose of including them within the purview of the Backward Classes of citizens under Articles 15(4) and 16(4) of the Constitution of India as is evident from G.O. Ms. No.15, dated 04-06-2004. The Commissionerate report does not contain the details of any investigation or enquiry as regards the social backwardness of Muslim community. The conclusion arrived at by the Commissionerate of Minorities Welfare is as follows:-

> "The study revealed that the main reasons for the Backwardness among Muslim Minorities are poor economical status, Illiteracy particularly among Women, in-adequate representation in employment, limited representation in local bodies and political spheres etc.,

The Commissionerate of Minorities Welfare strongly opined that the Socio-Economic conditions and Educational conditions of Muslim Minorities need to be improved."

123. There is no finding recorded by the Commissionerate as to the social backwardness of the community.

124. Be it as it may, the report contains district-wise occupation profile of Muslim minorities (page 6), the district-wise income pattern of Muslims (page 8) and district-wise literacy rate among Muslims (page 11). These three charts record the district-wise Muslim minority population (male, female and total) as if based on the 1991 census. The 1991 census [Volume – IV-(b)] records the Muslim population in the State as 59,23,954 as against the total of 64,57,887 estimated in the impugned report. There is a difference of 5,33,933 or approximately 9% between the census figures and the estimation made by Commissionerate.

125. In 13 of the 23 districts in the State, the Muslim population (male, female and total) as referred to in the report differs from the figures recorded in 1991 census. That so far as the Districts of Hyderabad and Nizamabad while the total tallies, there is a difference in the male and female population as recorded in the report and the 1991 census. Thus, only in 8 of the 23 districts in the State do the figures correctly tally with census figures.

126. The records reveal that on 06-06-2004, the ex-officio Commissioner for Commissionerate of Minorities Welfare addressed the Vice Chairman and Managing Director of the A.P. State Minority Finance Corporation (for short 'APSMFC') to fax the Form prepared by it consisting of 15 columns for evaluation of social, economic and educational status of Muslim minorities in the State to the District Officers and obtain information as per the format from the field staff and furnish the same to the Commissionerate immediately. On the same date, all the District Minorities Welfare Officers working under the Commissionerate of Minorities Welfare were directed to cooperate with the field staff of APSMFC in their respective districts in furnishing the necessary information as per the format. On the very same day, the Vice Chairman and Managing Director instructed all the Executive Directors to assist the Commissionerate of Minorities Welfare in preparing the report on the socio-economic and educational conditions of Muslim community in the State. They were requested to undertake necessary field survey wherever necessary duly utilising the material, if any, readily available in the matter. The format supplied is as follows:-

COMMISSIONERATE OF MINORITIES WELFARE

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FORMAT FOR EVALUATION OF SOCIO-ECONOMIC STATUS OF MUSLIM MINORITIES IN ANDHRA PRADESH

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Sl. No.	Name of the District	Total No. of Muslim Population in the District			Total No. of Muslims whose annual income is Rs.11,000/- or below	Percentage of Literacy rate among Muslim Minorities			Muslim Minorities Engages in different occupation				
		Male	Female	Total		Male	Female	Total	Artisans	Service Sector	Petty Business	Agri. Labourers	Marginal Farmers

Note: Furnish information by 03-07-2004 by Fax.

127. That all the Executive Directors of APSMFC have promptly faxed the format sent for them after duly filling the columns, which were received by the Commissionerate on 03-07-2004. The record does not disclose any information of any field survey in turn having been undertaken by the respective Executive Directors in the State in order to furnish the required particulars in the format sent to them. Some of the forms are not even signed by the officers concerned.

128. That a draft report, except the concluding portion was prepared on 03-07-2004 itself by the office; the ex-officio Commissioner for Commissionerate of Minorities Welfare added concluding portion and signed the same on 05-07-2004. The same Commissioner in his capacity as Principal Secretary, Minorities Welfare Department, prepared a note on 06-07-2004 and circulated the same for approval of the Government.

129. Based on these facts, can it be said that the Commissionerate did any rational and scientific investigation and collected data and examined the same as is required in law. Concededly, determination as to which classes are socially backward is a very difficult task for which purposes sociological, social, cultural and economic considerations are to be kept in view. The facts speak for themselves.

130. It is just and necessary to note, the 4-Volume study by the Osmania University at the instance of the A.P. Minorities Commission in the year 1989, which has been taken into consideration in compiling the report is prior to the publication of 1991 census. Report does not contain any official statistics or district-wise study. Neither the study undertaken by the A.P. Minorities Welfare Commission nor the study conducted by the APSMFC for 5 districts i.e., Kadapa, Chittoor, Guntur, Nizamabad and Hyderabad, has any relevance whatsoever for ascertaining social and educational backwardness for the purpose of making reservations in educational institutions under Article 15(4) or for the purpose of making reservations in posts under Article 16(4). The study undertaken was not for the purpose of identification of the Muslim Community as a backward class, either for the purpose of Article 15(4) or 16(4). We do not mean to say that the said reports could not have been taken into consideration as material for the purpose of deciding the social and educational backwardness or backwardness for the purpose of Article 16(4). That can as well be taken into consideration as material in the process of investigation and enquiry into the social and educational backwardness of the Muslim community in the State. The report merely shows that the Commissionerate utilised the said material. How and in what manner that material is found to be relevant for ascertaining the social backwardness is not stated in the report.

131. That another interesting aspect of the matter is that the present report does not make any reference to the findings of earlier Commissions viz., A.R Commission, 1970, and M.R. Commission, 1982, constituted by the Government of Andhra Pradesh to recommend inclusion/exclusion of groups in to the Backward Classes. The Commissionerate also does not make any reference to G.O. Ms. No.30 dated 25-08-1994 issued by the Government including Muslims along with certain other communities into the backward classes leading to the decision of this Court in **A.P. Backward Classes Welfare Association's case** (15 supra).

132. The report, in our considered opinion, is vitiated for the reason of not taking relevant factors into consideration. It is also vitiated for the reason of non-application of mind. We cannot help but observe that the Commissionerate acted in undue haste in submitting the report. The Commissionerate failed to realise the complex nature of investigation and enquiry that was required to be made. No scientific or reasoned investigation or enquiry has been made. In the absence of laying down the criteria for ascertaining the backwardness, the entire report is to be treated as an exercise in futility. The approach adopted by

the authority is improper and invalid.

133. We are not impressed by the submission made by Dr. Rajeev Dhawan, learned Senior Counsel, appearing on behalf of one of the interveners that Anantharaman's report has been rightly ignored by the Commissionerate, since it wrongly applied the test that all the backward classes deserving affirmative action must be like scheduled castes and scheduled tribes which is not the requirement according to the judgment in **Indra Sawhney's case** (1 Supra). The submission was that A.R. Commission applied the wrong criteria to draw analogy with Scheduled Castes and Scheduled Tribes, which was not required. The submission is without any factual foundation. A.R. Commission nowhere applied the criteria to draw analogy with scheduled castes and scheduled tribes, so also the M.R. Commission. That at any rate, the Commissionerate was not even aware of earlier reports submitted by the Commissions appointed by the Government and the subsequent events.

134. The decision of the Government is entirely based on the report and no other material. In view of our conclusion that the report itself is vitiated for the reasons stated, the impugned order of the Government does not stand on its own. The classification of the Muslims as socially backward is held to be inconsistent with the requirements of Articles 15(4) and 16(4).

Formation of opinion regarding adequacy of representation in the services of the state:

135. The study report states that with a view to understand the relative share of minorities in the Government and allied sectors, an attempt was made to collect the information from all the pay drawing officers located in all the districts in the State. The effort was carried out with the help of the District Collectors and concerned Chief Planning Officers; however, despite persistent efforts, the cooperation of the Pay Drawing Officers was not forthcoming in the required measure; the data that was ultimately collected not only varied in its coverage from District to District but also its quantum was very little; the drawing of inferences on its basis is somewhat untenable. It is under those circumstances, the Commissionerate decided to carry out a comprehensive census of only one District as a test case to find out the share of minorities in different levels of employment. For the said purpose, the Commissionerate selected Kurnool District, which is one of the two minorities dominated districts in the Andhra Pradesh.

136. The Commissionerate in its study report found that the total number of employees at different levels of employment in Kurnool District is 31,523 of which Muslims are 3,978 comprising 12.6% as against their 16.95% share in the population of the District. The Commissionerate proceeded on the assumption that adequate representation means proportional representation. It is needless to restate that adequate representation does not mean proportional representation.

137. The Government had no other material in its possession to arrive at for forming an opinion regarding inadequate representation of Muslims under the services of the State. The Governmental order does not speak of any inadequate representation of Muslims in employment. The counter affidavit is silent. There is no material available with the Government for forming its opinion as to the adequacy of representation of Muslims under the services of the State. No doubt, the formation of opinion is within the subjective satisfaction of the Government but not completely immune from judicial review.

138. It is well settled that not only should a class be backward class within the meaning of Article 16(4) for meriting reservation, but it should also be inadequately represented in the services under the State. The State can form an opinion on its own with regard to the inadequate representation in the services of the State on the basis of the material it has in its possession already or the material gathered through a Commission/Committee, person or authority. The formation of opinion by the Executive, if it is based on relevant material, may not ordinarily be interfered with by the Courts in exercise of its judicial review jurisdiction.

139. It is incumbent on the State Government to reach a conclusion that the backward class/classes for which the

reservation is made is not adequately represented in the State services. It has to undertake necessary exercise based on the available material. Mere assertion that it satisfied that a particular backward class/classes for which reservation is to be made is not adequately represented is not enough.

140. The opinion formed is not beyond judicial scrutiny altogether. "The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in ***Barium Chemicals v. Company Law Board*** (16 supra) which need not be repeated here. Suffice it to mention that the said principles apply equally in the case of a constitutional provision like Article 16(4) which expressly places the particular fact (inadequate representation) within the subjective judgment of the State/executive." [See: para 798 in **Indra Sawheny's case** (1 Supra)].

141. In ***Barium Chemicals' case*** (16 Supra), the Supreme Court observed:

> "The words, "reason to believe" or "in the opinion of" do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not formed on relevant facts ……

142. It is further held that:

> "formation of opinion … which is a purely subjective process, is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the authority is required to arrive at such an opinion from circumstances …… if the circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? ……there must therefore exist circumstances … … … if it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion there from suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute."

143. In the instant case, there is no material that was available with the Government to form its opinion, which may be a purely subjective process to arrive at any conclusion that the Muslim community is not adequately represented in the services of the State. The data collected from Kurnool District and incorporated in the report in no manner reveals inadequate representation of Muslim community in the services of the State. There were no material and circumstances on which the Government could have formed the opinion as to the adequacy of representation of Muslim community in the services of the State. In fact, the impugned G.O. does not reflect any formation of opinion as to the adequacy of representation. The G.O., is therefore, vitiated on the ground of non-application of mind.

144. Dr. Rajeev Dhawan, learned senior counsel, submitted that the judicial review must respect the Government's view and in such matters, judicial review must be ordinarily of lesser scrutiny. Dr.Dhawan suggested application of lenient standard for reviewing the State affirmative action. We agree. Still, the test is whether there is some material upon which opinion could have been formed by the Government ?

145. In the absence of any relevant material, the Government's decision cannot stand on its own. There must be some basis for the Government's view.

Question 4:

Whether Section 11(2) of Act 20 of 1993 is mandatory in its nature, if so, what are the consequences of non-compliance?

146. Whether the action of the State Government in issuing the impugned G.O without consulting the Andhra Pradesh Commission for Backward Classes constituted under the provisions of Act 20 of 1993 is valid?.

147. Learned counsel appearing on behalf of the petitioners submitted that the consultation with the Commission is

mandatory. It was also submitted that the action of the Government in issuing the G.O without consulting the Commission amounts to breach of continuous Mandamus issued by the Supreme Court in **Indra Sawhney's case** (1 supra). The State of Andhra Pradesh is one of the respondents in the said case and therefore bound by the directions issued by the Supreme Court.

148. Learned Advocate General submitted that the provisions of Act 20 of 1993 under which consultation is necessary, is directory in nature and therefore, the action of the Government in issuing the impugned G.O is not vitiated for that reason alone.

149. Some of the learned counsel appearing on behalf of the interveners made further submissions inter alia contending that the request of the Government for inclusion itself amounts to deemed consultation. Consultation does not mean consent. The Commission, as on the date when the Government had undertaken the exercise to include the Muslim Community in the list of backward classes, was not in existence; it was an impossible situation and the Government's action in not consulting the non-existent Commission cannot be found fault with. Doctrine of necessity and the legal maxim "*Lex non cogit ad impossibilia*" were also pressed into service.

150. It was also contended that the Minorities Commission set up under Act 31 of 1998, which has the specific power under Section 12(f) to suggest appropriate legal and welfare measures in respect of any minority to be undertaken by the Government, has been consulted thereby satisfying the procedural requirement of consultation laid down by the Supreme Court in **Indra Sawhney's case** (1 supra). The requirement is to consult an 'expert body' and the Minorities Commission, being an expert body, satisfies the procedural requirement of consultation.

151. It was submitted that the majority judgment in **Indra Sawhney's case** (1 supra) contemplates creation of more than one body to deal with the issues relating to identification of backward class citizens. The State itself appointed Commissionerate of Minorities Welfare to examine the issue relating to inclusion of Muslims in the list of backward classes and that itself would amount to consulting an expert body in terms of the directions of the Supreme Court in **Indra Sawhney's case** (1 supra). The power for making any special provision for the advancement of any socially and educationally backward classes of citizens vests in the State under Article 15(4) of the Constitution and reservation of appointments or posts in favour of any backward class of citizens under Article 16(4) of the Constitution. The power includes identification of backward classes and for making special provisions to them. The State is entitled to devise its own ways and methods and in the process, it may or may not consult the Commission. It was also contented that the language employed in Sections 2(a) and 2(d) read with Section 11 of Act 20 of 1993 is unambiguous making the provisions applicable to the revision of list maintained for the purposes of Article 16(4). The consultation, even if it is necessary, is required to be made by the Government only in case of inclusion or exclusion from the list of backward classes relatable only to Article 16(4); there is no requirement of consultation for making any provision in favour of any socially and economically backward classes under Article 15(4). The exercise undertaken by the Government is a composite one, both for the purposes of Articles 15(4) and 16(4) and at least the decision of the Government providing reservations in educational institutions under Article 15(4) may be saved.

152. Each of the counsel relied on number of authorities in support of their respective contentions. We shall refer to some of the important decisions cited, if not all of them.

153. It may not be possible to formulate any universal rule except to observe that the language employed in the provisions themselves may not be decisive in ascertaining whether a provision is mandatory or directory. Necessary regard must be had to the context, subject matter and object of the statutory provisions in question, in determining whether the same is mandatory or directory. We shall bear in mind two important statements of law. In an oft-quoted passage Lord Campbell said:

> "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or

obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered" (see *Liverpool Borough Bank v. Turner*, (1861) 30 LJ Ch 379, pp. 380, 381; referred to in *Vita Food Products Inc. v. Unus Shipping Co.,* (1939) 1 All ER 513 (PC).

154. The following passage from Craford: Statutory Construction, has been approvingly referred in **State of U.P v. Baburam, Upadhya**,[31]:

> "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other…".

155. It is the duty of the Court while ascertaining the real intention of the Legislature to consider whether on the construction adopted the object of the legislation will be defeated or furthered. That is the real test.

156. Before we proceed further to discuss and decide whether the provision is mandatory or directory in its nature, it is just and necessary to notice the object and the Scheme of the Act. The genesis of the Act and why it was enacted is also required to be noticed. The Statement of Objects and Reasons of Act 20 of 1993 makes it clear that it was decided to undertake a suitable legislation for constituting a Commission as per the directions of the Supreme Court to examine, consider and recommend the requests for inclusion and complaints of under inclusion and over inclusion in the list of backward classes. There is a specific reference to the Judgment delivered by the Supreme Court on 16.11.1992 in **Indra Sawhney's case** (1 supra) on the question of reservations in appointments in Central Services/Posts for Backward Classes. There is also a reference to the directions issued by the Supreme Court to the Central Government and the State Governments to set up permanent Backward Classes Commission. The Act came into force with effect from 8.12.1993. Section 3 of the Act deals with the constitution of the Andhra Pradesh Backward Classes Commission. The Commission shall consist of (a) a Chairperson who is or has been a Judge of High Court or a retired Judge of the Supreme Court; (b) a Social Scientist; (c) two persons, who have special knowledge in the matters relating to backward classes; and (d) a Member Secretary, who shall be an officer of the Government in the rank of Secretary to the Government. Section 4 deals with the term of office and conditions of service of Chairperson and Members. Section 9 deals with functions and powers of the Commission. The Commission is required to examine the request for inclusion of any class of citizens as a backward class in the list and hear complaints of over inclusion and under inclusion of any backward class in such list and tender such advise to the Government as it deems appropriate. The Commission shall examine and make recommendations on any other matters relating to backward classes that may be referred to it by the Government from time to time. It also authorizes the Commission to make an interim report at the request of the Government in regard to any Castes or Classes in whose cases urgent action under the Act is, in the opinion of the Government necessary. Under Section 10, the Commission is clothed with all the powers of the civil Court trying a suit while performing its functions. Section 11 which is important for our purpose reads as follows:

> **11. Periodic revision of list by the Government**:-- (1) The Government may at any time, and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.
>
> (2) The Government shall while undertaking any revision referred to in sub-section (1) consult the commission.

157. That a bear reading of Sections 9 and 11 of the Act suggests that they operate in two different situations. Under Section 9, the Commission is clothed with the jurisdiction to consider the requests for inclusion of any class of citizens as a backward class in the lists and also hear complaints of over-inclusion or under- inclusion of any backward class in such list and tender such advice to the Government as it deems appropriate. The jurisdiction conferred upon the Commission under Section 9 obviously is in respect of the existing list, after revision or prior to the revision. Section 9(3) enables the Government

to request the Commission to make an interim report in regard to any Castes or Classes in whose cases urgent action under the Act is necessary. Any decision or action taken by the Government on the basis of such an interim report of the Commission shall be subject to review with prospective effect as and when final report of the Commission is received. This itself suggests that the action based on the interim report is subject to review, which is bound to be undertaken by the Government so as to be in conformity with the final report of the Commission. It is also one mode of consultation. Even in cases of urgency, the requirement of consultation is not dispensed with.

158. Section 11 though its heading suggests that it deals with periodic revision of the list by the Government, it requires the Government to consult the Commission whenever it undertakes the revision of the list either with a view to exclude from such list, those classes who have ceased to be backward classes or for including in such list new backward classes. Whenever any new backward classes are included in the list, such inclusion amounts to revision of the list for including new backward classes.

159. The Act itself has been brought into existence in terms of the directions of the Supreme Court in **Indra Sawhney's case (1 supra)**. The Government of India and each of the State Governments were directed to constitute a permanent body for entertaining, examining and recommending upon the requests for inclusion and complaints of over-inclusion and under-inclusion in the list of Other Backward Classes of citizens. The advice tendered by such body shall ordinarily be binding upon the Government. The body must be comprised of experts in the field, both official and non-official and must be vested with necessary power to make a proper and effective enquiry. The Government of India and the State Governments were required to consult such body created in a matter of periodic revision of lists of OBCs, which includes inclusion of new classes. In fact, there is a specific direction that the Government must refer to the said bodies if any new classes or groups are proposed to be included among the OBCs in the first instance.

160. It is not difficult to discern the reason and purpose behind the course suggested by the Supreme Court in **Indra Sawhney's case (1 supra)**. Many of the lists ever since 1950 prepared by the State Governments on their own were found to be erroneous. The lists so prepared were quashed by the Courts on more than one occasion. Precisely for that reason, the Supreme Court desired and directed the Central and State Governments to create a body comprising of experts in the field, both official and non-official vested with necessary powers so that a proper and effective enquiry is made. More often than not, the identification made by the State Governments were found to be defective and some times based on caste, partisan considerations and for extraneous reasons. One of the objects sought to be achieved is to prevent extravagant claims by vocal groups whose burden of backwardness has been substantially lightened by affirmative action programmes. Protective discrimination policies must be justifiable, rational and reasonable. These policies cannot be based exclusively on caste criteria. It is to be remembered that reservations are not the end but only means to an end. It is primarily the duty of the State to inject moderation into the decisions taken under Articles 15(4) and 16(4). That is why there is need to have an independent expert body to examine the demands to include, complaints of over inclusion in the list of backward classes. Having regard to past experience, the Supreme Court desired that the Central as well as the State Governments, should constitute expert bodies to examine the inclusion or non inclusion of groups, classes and sections in the list of backward classes whose opinion, should ordinarily bind the Government. In this background, we shall proceed to consider some of the cases cited before us.

161. In **Naraindas vs. State of M.P**[32], the question that had arisen for consideration was whether Section 4(1) of the Madhya Pradesh Prathamik, Middle School Tatha Madhamik Shiksha (Pathya Pustakon Sambandhi) Vyavastha Abhiniyam Act, 1973 (Act 13 of 1973) which conferred power on the State Government to prescribe text books for higher secondary classes with prior consultation with the Board is a mandatory provision. On finding that the State Government consulted the Chairman and not the Board, the Supreme Court held that it would not amount to prior consultation with the Board before the State

Government issued a notification and accordingly held the notification to be invalid as being in breach of the mandatory requirement of the proviso to Section 4(1) of the said Act.

162. In **Narayana vs. State of Kerala**[33], the Supreme Court while interpreting Section 4 of the Electricity Act (1910) (as amended in 1958) which contemplates that in the matter of revocation of a licence, the Board should be consulted by the Government after the licensee's explanation has been received and the Board should make its recommendation only after considering it, observed that the order of revocation in breach of any one of those conditions, will undoubtedly be void. "The clause 'if in its opinion the public interest so required' is also a condition precedent. On a successful showing that the order of revocation has been made without the Government applying its mind to the aspect of public interest or without forming an honest opinion on that aspect, it will, we have no doubt, be void. The phrase 'after consulting the State Electricity Board' is sandwiched between the clause 'if in its opinion the public interest so requires' and cls. (a) to (d). In this context it appears to us that consultation with the Board is also a condition precedent for making the order of revocation. Accordingly, the breach of this condition precedent should also entail the same consequence as the breach of the other conditions referred to earlier".

163. In **Chandra Mohan v. State of U.P**[34], the Supreme Court while interpreting Article 233(1) of the Constitution of India which mandates that appointments of persons to be and the posting and promotions of District Judges shall be made by the Governor of the State in consultation with the High Court, observed that the exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of district judge in consultation with the High Court. "The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person belonging either to the "judicial service" or to the Bar, to be appointed as a district Judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body, which is the appropriate authority to give advice to him".

164. In **A.P State B.C.W Association's case** (15 supra), a Full Bench of this Court while construing the very Section 11(2) of Act 20 of 1993 held the same to be mandatory and not directory. This Court after referring the statement of objects and reasons and the scheme of the Act, took the view that by enacting A.P. Act 20 of 1993 and constituting B.C. Commission, procedure for identification of Backward Classes was sought to be regulated in the manner indicated by the said legal provisions contained in the Act. It was observed thus:

> "In fact, enacting of A.P Act 20/93 is only to enable the State Government to correctly and accurately identify the real and genuine Backward Classes, who need constitutional protection by way of reservations to attain the goal of egalitarian society. It is only to make provision for the benefit of real Backward Classes, the State Government has enacted law and constituted B.C. Commission and it does not amount either denuding or delegating its power to the B.C. Commission as ultimately even after the report of the B.C. Commission, it is the State Government which has to consider the same and take appropriate action. There should be material to base the conclusion of the Government identifying the genuine Backward Classes and the same can be had by any fact finding body appointed by the Government for that purpose; but, Government is precluded from appointing such an unofficial body when a law is enacted for constitution of B.C. Commission specially for that purpose and prescribing procedure therefor. The procedure, which has been prescribed under the Act (A.P. Act 20/93) cannot be called directory and it is mandatory. The Act obligates the Government to make a revision of the list of Backward classes every 10 years, but makes it optional to revise the list within the said period. The Government has now opted to make a revision. Exclusion of some castes from the list of Backward Classes or inclusion of new Backward Classes may be made after the B.C. Commission submits its report. But now the Government vide impugned G.O. intends to include 14 castes/communities as new Backward Classes. It can do so, but only after following the procedure prescribed under the Act and it will become final subject to judicial scrutiny, should they be challenged. As said above, in the absence of any law, the Government can adopt any method of identification of Backward Classes, but if a law is specially made for that purpose, such identification of Backward Classes shall be only made in accordance with law so made, i.e., A.P. Act 20/93, and not otherwise. The powers of the State under Article 162 are co/extensive with that of legislature. But, how far they traverse is the question. Is it permissible under our constitutional scheme to enact a law and also exercise powers under Article 162 of the Constitution, that too in derogation of the said law?"

165. It was ultimately held that the procedure for identification of Backward Classes for conferment of the benefits of reservation flowing from Articles 15(4) and 16(4) of the Constitution is prescribed by Act 20 of 1993 and such an identification

can only be made in accordance with the said mandatory provisions prescribed under the said Act and not otherwise. We are in respectful agreement with the view taken by the Full Bench.

166. It was contended that the requirement to make consultation a mandatory one, affects the enabling power conferred upon the State under Articles 15(4) and 16(4) of the Constitution.

167. The enabling power conferred upon the State under Articles 15(4) and 16(4) of the Constitution is coupled with duty. The requirement of constitution, in no manner, affects the power conferred on the State. It has the effect of structuring and streamlining the power, which is so well recognized by every system governed by Rule of Law and constitutionalism. Prescription of limitation on the exercise of the power is not unknown to the Constitution.

168. The Constitution on its face is, in large measure, a structuring text, a blue print for Government. The text marks the metes and bounds of the final authority and individual autonomy and individual freedom.

169. But what is Constitutionalism? "Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a Government in order".[35]

170. Wade in his treatise on Administrative Law observed: Particular Acts often require particular interests to be consulted. Some provide for schemes of control to be formulated by the persons affected themselves. Another device, which is often used is that of an advisory committee or council, which is set up under the Act and which must be consulted. The council will usually be constituted so as to represent various interests, and so as to be independent of ministerial control. And, in its turn, it may often consult other persons. The failure to consult will normally render the order void, as for neglect of a mandatory requirement. The requirement of consultation itself in no manner fetters the exercise of power of the consultor".

171. In **D.C. Wadwa vs. State of Bihar**[36], the Supreme Court observed that the Rule of law constitutes the core of our Constitution and it is the essence of the Rule of Law that the exercise of the power by the State whether it be the Legislature or the Executive or any other authority should be within the constitutional limitations.

172. Looking at the whole of the scope and purpose of Act 20 of 1993, one matter which stands out is that the Legislature has prescribed the manner in which the State is required to exercise its enabling power under Articles 15(4) and 16(4) of the Constitution of India. The requirement is 'consultation with a body comprising of experts' before excluding any class/classes already included in the list or for including in such list new backward classes. The fact that the legislature did not prescribe or lay down what will be the legal consequences of failure to observe its prescription is of no consequence as that itself would not be a ground to read Section 11 of the Act as a directory one. The importance of the provision that has been disregarded and the relation of that provision to the General object intended to be secured by the Act is given to determine whether the provisions of any act are to be regarded as mandatory. This principle has been approvingly referred in **Coney v. Choyce Luddon**[37].

173. The legislature used both expressions "may" and "shall" in Section 11 of Act 20 of 1993. It must be presumed that the very use of "shall" in Sub-Section (2) of Section 11 of Act 20 of 1993, is obviously with a view to make consultation with the Commission mandatory and not directory.

174. The principle of construction is stated in *Maxwell on The Interpretation of Statutes* in the following manner:

> "From the general presumption that the same expression is presumed to be used in the same sense throughout an Act or a series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning. "Where the Legislature'" said Lord Tenterden C.J., "in the same sentence uses different words, we must

presume that they were used in order to express different ideas."

175. Learned Advocate General, however, submitted that the provisions of Act 20 of 1993 are directory in its nature since the recommendations made by the Commission are advisory in its nature, which does not bind the Government. Learned Advocate General placed reliance upon the decisions of the Supreme Court in **M/s. Hindustan Zinc Limited v. Andhra Pradesh State Electricity Board & Others**[38]**; L. Hazari Mal Kuthiala v. Income Tax Officer, Special Circle**[39]**; G.S. Lamba v. Union of India**[40]**; Shashikanth Singh v. Tarkeshwar Singh**[41]**; Haridwar Singh v. Bagun Sambrui**[42]**; and Raj Lakshmi Mills v. Shakti Bhakoo**[43]**.** It is not necessary to refer in detail to each of the judgments cited and referred to hereinabove since the question whether a provision is mandatory or directory always depends upon the subject matter, the importance of the provision, the relation of the provision to the general object intended to be secured by the Act. The law is succinctly summarized by the Apex Court in **Election Commission, in RE: Special Reference No.1 of 2002**[44] in the following manner:

> "In determining the question whether a provision is mandatory or directory, the subject-matter, the importance of the provision, the relation of the provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get the real intention of the legislature by carefully attending the whole scope of the provision to be construed. The key to the opening of every law is the reason and spirit of the law, it is the *animus impotentia,* "the intention of the law-maker expressed in the law itself, taken as a whole". [See: *Bratt v. Bratt (Addams at p.216)-(1826) 3 Addams 2100].*

176. Sri S.Ramachander Rao, learned senior counsel however placed reliance upon the judgment of this Court in **Mallela Venkata Rao Vs. State of A.P.**[45] in support of his submission that the requirement of consultation cannot be raised to the pedestal of a binding opinion. In **Mallela Venkata Rao's case** the contention was that in view of non compliance of Article 338(9), which envisages that the State Government shall consult the Commission in all policy matters affecting Scheduled Castes and Scheduled Tribes, the decision to categorise the scheduled castes was bad in law. On facts, it was found that the State referred the matter to the National Commission in compliance with the orders of the Court simultaneously during the pendency of the appeal in the Supreme Court. The National Commission made no recommendation for the State to deal with the factual situation. It is under those circumstances, the Court observed " consultation cannot be raised to the pedestal of a binding opinion….. otherwise too no recommendation having been made by the National Commission to the State government, consultation having been carried out, the impugned legislation cannot be faulted for violation of Article 338(9)." It was a case where the National Commission in fact was consulted by the State Government. The decision renders no assistance for deciding the issue that arises for consideration before us.

177. Learned Advocate General, however, submitted that the legislature has enacted Act 20 of 1993, in the light of the observations and directions issued by the Supreme Court in **Indra Sawhney's case** (1 Supra) but in the process did not surrender the powers available to the State Government traceable to Articles 15(4) and 16(4); the State did not surrender its power to the Commission. The Commission itself was constituted under Articles 15(4) and Article 16(4) read with Article 340 of the Constitution of India as a concomitant of the power to identify Backward class of citizens. The power available to the State under Articles 15(4) and 16(4) is absolute in its nature; the body created under Act 20 of 1993 as a concomitant of the State power under Article 16(4) read with Article 340 of the Constitution of India cannot take away powers of the State Government to identify and provide social reservations in favour of backward classes; such limitation cannot be read into Articles 15(4) and 16(4). The submission was, these aspects must be borne in mind to gather the intention and scope of the provisions of the Act. In support of his submission, learned Advocate General placed reliance upon the following decisions of the Supreme Court:

1) **South Central Railway Employees Cooperative Credit Society Employees' Union, Secunderabad v. Registrar**

of Cooperative Societies & Others[46]**.**

2) **K. Anjaiah v. K. Chandraiah**[47]**.**
3) **Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj**[48]**.**
4) **Anwar Hasan Khan v. Mohd. Shafi**[49]**.**
5) **Indian Handicrafts Emporium v. Union of India & Others**[50]**.**
6) **Balram Kumawat v. Union of India**[51]**.**
7) **D. Saibaba v. Bar Council of India**[52]**.**
8) **Marri Chandra Shekar Rao v. Dean, Seth G.S. Medical College**[53]**.**

178. These decisions do not render any particular assistance for deciding the issue whether consultation under Section 11(2) of Act 20 of 1993, is mandatory or directory in its nature.

179. The Commission constituted under the provisions of the Act in no manner takes away the powers of the State Government under Articles 15(4) and 16(4). The provisions prescribe the procedure for exercising that power by the State Government and to that extent structures the exercise of power by Government.

180. The impugned G.O. Ms. No.33 dated 12-07-2004 issued by the State Government is an executive order under Articles 15(4) and 16(4) read with Article 162 of the Constitution of India. It is too basic a principle to state that the State Government has executive power, in relation to all matters with respect to which the legislature of the State has power to make laws. It is equally well settled that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these laws. But it is hardly necessary to reiterate when there is a statute on the matter, the executive must abide by that Act by that statute and it cannot in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule or Act. This position in law is squarely settled. (See: **Rai Sahib Ram Jawaya Kapur & Others v. The State of Punjab**[54]; **B.N. Nagarajan & others v. State of Mysore & Others**[55])

181. In **State of Sikkim v. Dorjee Tshering Bhutia**[56] the Supreme Court while adverting to the question whether the notification issued by the Sikkim Government deciding to make special recruitment to the services on the basis of written examination-cum-viva voce test on the ground of exigencies of service without consultation with the Public Service Commission was valid in law observed:

> "The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions is without jurisdiction and is a nullity."

182. It was however found that Public Service Commission was not constituted during all those five years and in the absence of any material to the contrary, the Court assumed that there was justifiable reason for the delay in constituting the Commission. The object of regulating the recruitment and conditions of service by statutory provisions, which require consultation with the Public Service Commission became unworkable and inoperative. " It is the operative statutory provisions which have the effect of ousting the executive power of the State from the same field. When in a peculiar situation, as in the present case, the statutory provisions could not be operated. There was no bar for the State Government to act in exercise of its executive power". The Supreme Court having found that the notification was issued to remove the stagnation and to afford an opportunity to the eligible persons to enter the service, concluded that the State Government was justified in issuing the impugned notification in exercise of its executive power. The observations are required to be understood in the context in which they were made. Consultation with the Public Service Commission itself is not a mandatory requirement and it is for that reason, the Supreme Court upheld the action of the State Government in issuing the impugned notification in exercise of its

executive power since the rule requiring consultation itself was not in operation. The provision requiring consultation with the Public Service Commission itself is a directory one. In the instant case, we are concerned with a provision, which is mandatory in its nature.

183. We have noted the purposes for which the Act has been brought into existence, and its scope and the general object intended to be achieved. We have no doubt whatsoever in our mind that Section 11 of Act 20 of 1993, is mandatory in its nature and non-compliance thereof renders the action of the State Government void and inoperative.

184. It was also submitted by the counsel appearing on behalf of the interveners that the Government of Andhra Pradesh had already consulted Justice Putta Swamy Commission for inclusion of Muslims as backward classes and had also sought an interim report and the Commission did not respond to the request of the State Government and in the circumstances, the request made shall be treated as consultation within the meaning of Section 11(2) of Act 20 of 1993.

185. Further contention was, the decision of the Government in G.O. Ms. No.30 dated 25-08-1984 must be treated as a decision for recommendation and the Commission was bound to consider the same but it failed to discharge its duty. In the circumstances, the repository of the authority, the State Government, need not wait interminable. It was also contended that the judgment in **Indra Sawhney's case** (1 Supra) contemplated more than one expert body and as such, consultation with A.P. State Minorities Commission created under Act 30 of 1998 or the Commissionerate of Minorities Welfare headed by Ex-officio Commissioner meets the requirement in law. The sum and substance of the submission was that it is not necessary that the Commission constituted under Act 20 of 1993, alone should be consulted and it would be enough if any other expert body is consulted for the purpose of exercising the power under Article 15(4) and 16(4).

186. In the counter affidavit filed by the State Government, it is *inter alia* stated that as per Section 3 of Act 20 of 1993, the State Government constituted Justice Putta Swamy Commission in the year 1994 vide G.O. Ms. No.9 dated 26-01-1994 for a period of three years and the term of the said Commission was extended from time to time up to 30th September, 2002. "Though the Commission was there for a period of 7½ years, it did not submit any report to the Government, as a result, the request of various classes of citizens/communities for inclusion in the list of backward classes remained as it is." It is nowhere stated that the State Government consulted the Commission at any point of time for inclusion of the Muslims in the list of backward classes. The Government at no point of time consulted the Commission for inclusion of the Muslims in the list of backward classes. That at any rate, it is not stated so in the affidavit filed on behalf of the State. Even if any request as such was made by the Government or the G.O. Ms. No.30 dated 25-08-1994 is to be treated as a request, the same does not amount to consultation within the meaning of the provisions of Act 20 of 1993.

187. What is "Consultation"? It is unnecessary to burden this judgment with various authoritative pronouncements of the Supreme Court interpreting expression "Consultation". Suffice it to notice, while construing the expression "Consultation," the Supreme Court had laid down that "though consultation does not mean "concurrence", it postulates an effective consultation which involves exchange of mutual view points of each other and examination of the relative merits of the other point of view. Consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. (See **Chandramouleshwar Prasad v. Patna High Court**,[57]; **M.M. Gupta v. State of Jammu & Kashmir,**[58]; **State of Jammu & Kashmir v. A.R. Zakki & Others,**[59]; and **High Court of Judicature, Rajasthan v. P.P. Singh**[60].

188. The contention that **Indra Sawhney's case** (1 Supra) contemplated more than one expert body and as such consultation with the A.P. State Minorities Commission created under Act 30 of 1998 or the Commissionerate of Minorities

Welfare headed by the Ex-officio Commissioner is valid is equally untenable.

189. In **Indra Sawhney's case** (1 Supra) it was held that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of *Other Backward Classes* can be made; such body must be empowered to examine the complaints of the said nature and pass appropriate orders; must be composed of experts in the field, both official and non-official, and must be vested with necessary powers to make a proper and effective inquiry. The body to be so created is required to be a permanent one. Whenever any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body before any action is taken and the action can be taken only on its recommendations; the recommendations/opinions of the body should ordinarily be binding upon the Government; in case of disagreement, the Government is required to record its reasons therefor.

190. The Minorities Commission constituted under Act 31 of 1998 cannot be considered to be as another body created and constituted to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the list of other backward classes can be made.

191. Act 31 of 1998, is an Act to provide for the establishment of religious minorities commissions to safeguard the interest of the minority communities in the State and for matters connected therewith or incidental thereto. Section 12 of Act 31 of 1998 deals with the functions of the Commission which include evaluation of the working of various safeguards provided in the Constitution for protection of the minorities and in laws passed by the Union and State Governments; to make recommendations with a view to ensure effective implementation and enforcement of all (safeguards and) the laws; to undertake a review of the implementation of the policies pursued by the Union and the State Governments with respect to the minorities; to look into specific complaints regarding deprivation of rights and safeguards in the interest of the minorities.

192. By no stretch of imagination, it can be contended that the functions of the Commission include entertaining complaints of wrong inclusion or non-inclusion of groups, classes and sections in the list of other backward classes. It is not a body created to deal with in any manner whatsoever in the matter of making special provision in favour of socially and educationally backward citizens within the meaning of Article 15(4) and reservations in favour of backward classes under Article 16(4). The field of operation of Act 31 of 1998 is totally different and alien to the field covered by Act 20 of 1993.

193. Likewise, the Commissionerate of Minorities Welfare headed by the Ex-officio Commissioner, who is none other than the Principal Secretary to the Government entrusted with the specific job of examining the social and educational backwardness of Muslim community for the purpose of including them within the purview of the backward classes of citizens under Articles 15(4) and 16(4), cannot be considered to be a permanent body or an expert body to consider inclusion or non-inclusion of groups, classes and sections in the list of Backward Classes. The Commissionerate is not vested with necessary powers to make a proper and effective enquiry. It is not a body created under Act 20 of 1993 or Commissions of Inquiry Act. That as long as Act 20 of 1993 continues to be in operation, the State could not have created any other body or bodies for the same purpose and entrusted the same functions that are required to be discharged by the Commission under the provisions of Act 20 of 1993.

194. The expression "body" or "bodies" used in paragraph 847 of **Indra Sawhney's case** (1 Supra) cannot be read out of context. The expression 'body' referred to would mean 'body' to be created by the Central Government and 'bodies' by each of the State Government and Union territories. The judgments have to be read in the context and not as statutes of Euclidean Theorems.

195. It was also contended that since there was no Commission in existence, the State had no option but to create

another body in order to implement its policy of providing reservations to Muslim community.

Doctrine of Necessity: *Impotentia excusat legam and Lex non cogit ad impossibilia*:

196. Whether the Doctrine of Necessity which is pressed into service is applicable. The body constituted by the Government known as the A.P. Commission for Backward Classes is to exercise the powers conferred on it and to perform the functions assigned to it under the Act as a permanent body. It is distinct from composition consisting of all the members including the Chair Person nominated by the Government. There can be a vacancy in the composition of the members but the body created under Section 3 of the Act does not cease to be a permanent body as long as the Act continues to be in operation. The Body constituted under Section 3(1) of Act 20 of 1993 is distinct from the Members nominated thereto under Section 3(2) of the Act.

197. The Government vide G.O Ms. No. 9 dated 26.1.1994 constituted the Commission for Backward Classes headed by Justice Putta Swamy for a term of three years from the date of assumption of the Office. It was reconstituted vide G.O. Ms. No. 10 dated 31.3.1997 after the expiry of their tenure of three years. The term of the Chairman and other Members of the Commission was being extended every six months with effect from 31.3.2000 having regard to the magnitude of the work to be done by the Commission. The term of the said Commission was extended from time to time up to 30.9.2002. Thereafter, the office of the Chairman as well as the Members remained vacant. The Government every time assigned good and cogent reasons for extending the term of the said Commission in view of the magnitude of the work to be done by the Commission. No reasons are forthcoming as to why the Government did not take any steps whatsoever after 30.09.2002 either for extending the term of the same Commission or for making new appointments. Act 20 of 1993 enables the Government to remove any person from the Office if that person refuses to act or becomes incapable to act. Nothing prevented the Government from nominating new Members.

198. In **Charan Lal Sahu v. Union of India**[61], the doctrine of necessity was explained. The Central Government represented claimants victims in a suit against the Union Carbide (I) Limited responsible for a disaster resulting in loss of lives and damage to property on an extensive scale. The question whether there is scope for the Union of India being responsible or liable as a joint tort-feasor and if so, can it represent the claimants-victims had arisen for consideration. The Court observed, the concept that where there is a conflict of interest, the person having the conflict should not be entrusted with the task of representing, does not apply in the fact situation. The Supreme Court observed “the doctrine of necessity would override the possible violation of the principles of natural justice that no man should be judge in his own cause. According to this doctrine even if all the members of the Tribunal competent to determine a matter were subjected to disqualification, they might be authorised and obliged to hear the matter by virtue of the operation of the common law doctrine of necessity. An adjudicator who is subject to disqualification on the ground of bias or interest in the matter which he has to decide may in certain circumstances be required to adjudicate if there is no other person who is competent or authorised to be adjudicator or if a quorum cannot be formed without him or if no other competent tribunal can be constituted.”

199. The doctrine of necessity would override the possible violation of principles of natural justice that no man should be a judge in his own cause. We are unable to discern as to how the doctrine of necessity would be applicable to the situation on hand where the State acted contrary to the mandatory provisions of law.

200. Lord Denning M.R cautioned, the doctrine of necessity must, however, be carefully circumscribed. Else necessity would open the door to many an excuse {see **Southwark L.B.C. v. Williams (C.A.) 1971 (1) Chancery Division 734**}.

201. The Doctrine of Necessity pleaded, in our considered opinion, has no application to the fact situation on hand. The

Government by its own fault made the Commission defunct and therefore cannot take advantage of its own action and plead inability on the ground of necessity.

202. In **In Re Presidential Poll**[62], the principal question that had arisen for consideration was whether the election to fill the vacancy caused on the expiry of the term of the office of the President of India must be completed before the expiry of the term of office notwithstanding the fact that the Legislative Assembly of the State of Gujarat was dissolved. The Supreme Court answered the reference expressing its opinion that the election to the office of the President must be held before the expiration of the term of the President notwithstanding the fact that at the time of the said election, the Legislative Assembly of the State is dissolved. Explaining the maxims *impotentia excusat legam* and *lex non cogit ad impossibilia*, the Court observed thus:

> "The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law *impotentia excusat legam* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legam* is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See *Broom's Legal Maxims* 10th Edition at pp. 162-163 and *Craies on Statute Law* 6th Ed. at p. 268)."

203. We fail to appreciate as to how the said legal maxims have application to the fact situation on hand. The State cannot plead that performance of the formalities prescribed by Section 11(2) of the Act has been rendered impossible by circumstances over which the Government had no control. The Government as well could have reconstituted the Commission and sought for its advise.

204. The maxims of *law impotentia excusat legem* and the *law lex cogit ad impossibilia* are explained by the Supreme Court in **Election Commission, IN RE's case** (44 supra) thus:

> "The maxim of *law impotentia excusat legem* is intimately connected with another maxim of *law lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See *Broom's Legal Maxims*, 10th Edition, at pp. 1962-63 and *Craies on Statute Law*, 6th Edn., p. 268.) These aspects were highlighted by this Court in Special Reference No. 1 of 1974. Situations may be created by interested persons to see that elections do not take place and the caretaker Government continues in office. This certainly would be against the scheme of the Constitution and the basic structure to that extent shall be corroded".

205. In our considered opinion, the case on hand falls within the principle that: "Where an Act creates an obligation, and enforces the obligation in a specified manner, ……it to be a general rule that performance cannot be enforced in any other manner": (see *Doe d. Rochester (Bp) v. Bridges* (1831) 1 B. & Ad. 847, 859).

206. This principle has been quoted with approval in **Southwark L.B.C. v. Williams (C.A.)**[63].

207. The same principle was artfully enunciated by Justice Louis D.Brandeis almost seventy years ago. To quote Justice Brandeis:

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled

> if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example…… If the Government becomes a law breaker, it breeds contempt for law; it invites everyman to become a law unto himself; it invites anarchy. To declare that in the administration of the …… law the end justifies the means – to declare that the government may (discriminate in order to secure equality)- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

208. We do not find any merit in the submission that even in respect of mandatory/absolute enactments, if the situation does not enable the compliance of the conditions, then the maxims *law lex non cogit ad impossibilia* and the doctrine of necessity would be applicable.

209. The Government cannot take advantage of its own omissions in not taking prompt action in nominating the Members to the Commission for Backward Classes to exercise powers conferred under the Act and contend that it has no alternative except to go ahead and appoint somebody else for the same purpose and provide reservations. The Government cannot take advantage of its own inaction in order to bypass the statute. It is well settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. In **Nazir Ahmed v. King Emperor**[64], the principle is stated as under:

> "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all".

210. This rule has since been followed by the Supreme Court in various decisions, it is unnecessary to burden this Judgment by citing them. It is that rule which applies to the situation on hand.

211. For all the aforesaid reasons, we hold that Section 11(2) of Act 20 of 1993 is mandatory in nature and not a directory one. The State Government in issuing the impugned G.O acted in contravention of the mandatory provision of law. The G.O is therefore ultra vires.

212. Now we shall deal with the contention that Act 20 of 1993 has no application in the matter of making special provisions under Article 15(4).

213. The State Government required the Commissionerate of Minorities Welfare to examine the social, economic and educational backwardness of the Muslim Community in the State for the purpose of including them within the purview of Backward Classes of citizens under Article 15(4) and 16(4) of the Constitution of India and present its report. The Commissionerate of Minorities Welfare accordingly submitted its report duly making its recommendation to provide "reservation facility to Muslim minorities in Employment, educational and other fields on par with backward classes in the State". The Government accordingly issued the impugned G.O providing 5% reservations to seats in educational institutions and employment in the State. It is a composite order providing social reservations both under Articles 15(4) and 16(4).

214. There is only one list of Backward Classes maintained by the State of Andhra Pradesh, both for the purposes of reservations under Articles 15(4) and 16(4). The list notified by the Government in G.O Ms. No. 1793 dated 23.9.1970 continues to be in operation as on the date; so far no distinction has been made in the matter of providing reservations to seats in educational institutions and posts in employment. The same common list is being applied for the purposes of both Articles 15(4) and 16(4) of the Constitution. It may not be possible to segregate and compartmentalize social reservations under Articles 15(4) and 16(4) by treating as if they have no bearing on each other.

215. In **Anil Kumar Gupta v. State Of U.P**[65], the Supreme Court speaking through Jeevan Reddy, J, while referring to the observations of the Court in **Indra Sawhney's** case (1 supra) about horizontal reservations under Article 16(1) observed, "though the said observations were made with reference to Clauses (1) and (4) of Article 16, the same apply with equal force to Clauses (1) and (4) of Article 15 as well".

216. In terms of the law declared by the apex Court in **K.C. Vasanth Kumar's** case (25 supra); **Indra Sawhney's case** (1 supra) and **Preeti Srivastava v. State of Madhya Pradesh**[66], the list of backward classes based on which reservations are provided, both under Articles 15(4) and 16(4) of the Constitution is to be periodically reviewed. The observations made in **Indra Sawhney's** (1 supra) case that the body composed of experts should be created and be consulted in the matter of periodic revision of list of O.B.Cs would equally be applicable to the periodic revision of the list maintained even for the purposes of Article 15(4) of the Constitution of India.

217. In **Preeti Srivastava's case** (66 supra), the question was whether apart from providing reservations for admission to Post Graduate Courses in Engineering and Medicine for special category candidates, was it open to the State to prescribe different admission criteria, in the sense of prescribing different minimum qualifying marks, for special category candidates, seeking admission under the reserved category. It was a case under Article 15(4) of the Constitution relating to reservations to seats in educational institutions. The elements of Article 335 which deals with the claims of scheduled castes and scheduled tribes to services and posts to be taken into consideration consistently with the maintenance of efficiency and administration, has been taken into consideration and it was held, the elements of Article 335 colour the selection of candidates for the Post Graduation Courses and the rules framed for the purpose. The principles enunciated in Indra Sawhney's case, essentially a case dealing with Article 16(4) were applied to determine the nature, scope and extent of reservations under Article 15(4) of the Constitution. The social reservations made under Articles 15(4) and 16(4) were never viewed in watertight compartments. It is observed in **Preeti Srivastava's case** (66 supra) as under:

> "Since every such policy makes a departure from the equality norm, though in a permissible manner, for the benefit of the backward, it has to be designed and worked in a manner conducive to the ultimate building up of an egalitarian
> non-discriminating society. That is its final constitutional justification. Therefore, programmes and policies of compensatory discrimination under Article 15(4) have to be designed and pursued to achieve this ultimate national interest. At the same time, the programmes and policies cannot be unreasonable or arbitrary, nor can they be executed in a manner which undermines other vital public interests or the general good of all. All public policies, therefore, in this area have to be tested on the anvil of reasonableness and ultimate public good. In the case of Article 16(4) the Constitution makers explicitly spelt out in Article 335 one such public good which cannot be sacrificed, namely, the necessity of maintaining efficiency in administration. Article 15(4) also must be used, and policies under it framed, in a reasonable manner consistently with the ultimate public interests".

218. The question, the backwardness contemplated under Article 16(4) is a socially backwardness or educational backwardness or whether it is both social and educational backwardness had arisen for the first time in Indra Sawhney's case. Until then, it was understood that it is social and educational backwardness of a class which is material for the purposes of both Articles 15(4) and 16(4). For the first time in **Indra Sawhney's case** (1 Supra) it was discovered that certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). It was held "it would, thus, be not correct to say that backward class of citizens in Article 16(4) are the same as the social and educational backward classes in Article 15(4)". The backward classes under Article 16(4) constitute a larger group than the social and educational backward classes under Article 15(4).

219. That a plain reading of the provisions of Act 20 of 1993 including the definitions of backward classes and the list and the scheme of the Act suggests that consultation with the Commission is applicable only for the purposes of over inclusion or under inclusion into the list of backward classes which is essentially a list prepared by the Government for the purpose of making provision for the reservations to appointments of posts in favour of backward classes of citizens which are not adequately represented in the services under the Government and in local authority or other authority in the State. The requirement of consultation with the Commission under Act 20 of 1993 may not be applicable for inclusion of a class in the list of socially and educationally backward classes under Article 15(4). Does it mean that the State Government in exercise of its

enabling power under Article 15(4) prepare a list of socially and educationally backward classes for the purposes of making special provisions and utilize the same for the purpose of making reservations under Article 16(4) without consulting or bypassing the Commission since that list may as well be applicable to provide reservations under Article 16(4)? In our considered opinion, it cannot. What is prohibited directly cannot be achieved in an indirect manner. The exercise of power in such a manner would be a fraud on Constitution. Since the list prepared by the State is for both the purposes of Articles 15(4) and 16(4), the suggested hair splitting is impermissible. The suggested interpretation if accepted results in confusion and utter chaos.

220. In our considered opinion, the same requirement of consultation with an expert body would be equally applicable for revising the list and considering the complaints of under inclusion or over inclusion of socially, educationally backward classes in the list prepared by the State. That either for inclusion or exclusion or for addition of a new group or caste or class or community into socially and educationally backward class, for the purposes of Article 15(4), the requirement of consultation cannot be dispensed with. It is for the State to create another expert body as it did by enacting Act 20 of 1993 or entrust the same to the Commission already constituted or devise such mechanism which in its discretion may meet the requirement in terms of the directions of the Supreme Court in **Indra Sawhney's case** (1 supra). The body to be so created must be a permanent and expert body similar to the one already created under the provisions of Act 20 of 1993.

Question 5:

Whether the Creamy Layer is to be excluded in the course of identification of backward classes?

221. Chandra Chud, Chief Justice, in **K.C. Vasanth Kumar's case** (25 supra) observed that the policy of reservation in employment, education and legislative institutions should be reviewed every five years or so. Such an exercise will at once offer an opportunity to the State (1) to rectify the distortions arising out of particular facets of the reservation; (2) to the people, both official and non official, to ventilate their views in the public debate on the practical impact of the policy of reservations.

222. In **Indra Sawhney's case** (1 supra) it was stated that upon a member of the backward class reaching "advance social level or status" he would no longer belong to the Backward Class and would have to be weeded out. That exclusion of such (creamy layer) socially advanced persons will make the 'class' a truly backward class and would more properly serve the purpose and object of clause (4) of Article 16. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially, the connecting thread between them and the remaining class snaps. Some times, the economic advancement may be so high which may result in social advancement.

223. Sawant, J also accepted that creamy layer must be excluded and after excluding them alone, would the 'class' be a 'compact class'. It was observed that at least some individuals and families in the backward classes, however small in number, gain sufficient means to develop capacities to compete with others in every field. Social advancement is to be judged by the "capacity to compete" with forward caste, achieved by members or sections of the backward classes. "Such persons or sections, who reached that level and acquired the capacity to compete are not entitled any longer to be called as part of the backward class, whatever their original birthmark. Taking out these "forwards" from the "backwards" is obligatory as these persons have crossed the Rubicon."

224. That upon a detailed analysis of the views expressed in **Indra Sawhney's case** (1 supra) the Supreme Court in **Indra Sawhney v. Union of India**[67] observed:

> "As the "creamy layer" in the backward class is to be treated "on a par" with the forward classes and is not entitled to benefits of reservation, it is obvious that if the "creamy layer" is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as *equals* (forwards and creamy layer of backward classes) *cannot be treated unequally*. Again, non-exclusion of creamy layer will also be violative of Articles 14,

16(1) and 16(4) of the Constitution of India since *unequals* (the creamy layer) *cannot be treated as equals,* that is to say, equal to the rest of the backward class. These twin aspects of discrimination are specifically elucidated in the judgment of Sawant, J. where the learned Judge stated as follows: (SCCp.553, para 520)

"[T]o continue to confer upon such advanced sections … special benefits, would amount to treating *equals unequally* … Secondly, to rank them with the rest of the backward classes would … amount to treating the *unequals equally."*

225. It was held that an executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14, 16(1) and also of Article 16(4). This concept of creamy layer among the backward classes is not formulated and enunciated for the first time in Indra Sawhney. In **State of Kerala vs. N.M.Thomas**[68], the Supreme Court administered a word of 'sociological caution'. It was observed that the benefit of reservations, by and large are snatched away by the top creamy layers of the Backward class or the caste "thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake". Secondly, this claim is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near equals formally categorized as the upper brackets.

226. Krishna Iyer, J. observed:

"No caste, however, seemingly backward…can be allowed to breach the dykes of equality of opportunity guaranteed to all citizens. To them the answer is that, save in rare cases of 'chill penury repressing their noble rage, equality is equality-nothing less and nothing else.' The heady upper berth occupants from 'backward' classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the need-based bulk of the backward of the 'office' advantages, the nation by classification reserves or proffers. The constitutional *'dharma'* however, is not an unending *deification* of 'backwardness' and showering 'classified' homage, regardless of advancement registered, but progressive exercising of the social evil and gradual withdrawal of artificial crutches."

227. In **Ashok Kumar Thakur vs. State of Bihar**[69], it is held that affluent part of a backward class called creamy layer has to be excluded from the said class and the benefit of Article 16(4) can only be given to the class, which remains after the exclusion of the creamy layer. The backward class means, 'class' which has no element of 'creamy layer' in it. "It is mandatory under Article 16(4) – as interpreted by this Court – that the State must identify the creamy layer in a backward class and thereafter while excluding the creamy layer extend the benefit of reservation to the class which remains after such exclusion".

228. The contention that it is only the non creamy layer among the Muslim community who are now classified as backward class for the purposes of deriving the benefit of social reservations alone are aggrieved, if at all and the issue need not be examined by this Court at the instance of the petitioners is totally unacceptable in view of the authoritative pronouncement of the Supreme Court in **Indra Sawhney's case-II** (67 supra) wherein it is held that the non exclusion of the creamy layer or the inclusion of forward caste in the list of backward classes will, therefore be totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment."

229. Thus, the impugned G.O, which does not make any provision to exclude the creamy layer from the benefit of social reservations is violative of Articles 14, 15(1) and 16(1) and also of Articles 15(4) and 16(4) of the Constitution of India. Non-exclusion of creamy layer has the same effect of inclusion of forward caste/groups in the list of backward classes. The

creamy layer like the forward caste or groups among the Muslim community are not entitled to the benefit of social reservations.

Question 6:

To what extent the Social Reservations can be made?

230. In **Indra Sawhney's case** (1 supra) the Supreme Court pointed out that Article 16(4) speaks of adequate representation and not of proportionate representation. Adequate representation cannot be read as proportionate representation. The concept of proportionate representation is accepted only in Articles 330 and 332 of the Constitution of India and that too for a limited period.

231. It is further held that the principal aim of Articles 14, 16 is equality and equality of opportunity and that clause (4) of Article 16 is the means of achieving the very same objective. Clause (4) is a special provision – though not an exception to clause (1). Both the provisions have to be harmonized and it should be borne in mind that both are but the restatements of principles of equality enshrined in Article 14. " The provisions under Article 16(4) – conceived in the interests of certain sections of society – should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society."

232. The Supreme Court having held that reservations contemplated in clause (4) of Article 16 should not exceed 50% however observed that in certain extraordinary situations, some relaxations may become imperative. In doing so, extreme caution is to be exercised and a special case made out. However, the rule of 50% shall be applicable to only social reservations.

233. In a system governed by Rule of Law and the Constitutionalism, every power is required to be exercised reasonably and fairly. The power conferred by clause (4) of Article 16 is also required to be exercised in a fair manner and within reasonable limits. The claim of absolute power is anathema to Rule of Law and alien to Constitutionalism.

234. The reservations under Articles 15(4) and 16(4) prior to the impugned G.O, as is evident from G.O.Ms.No.1793 dated 23.9.1970 was at 46% and that the reservation of additional 5% being provided under the impugned G.O. reservation under Articles 15(4) and 16(4) would increase to 51%. Neither the impugned G.O. nor the counter affidavit offered any explanation as to whether there was any extraordinary situation that required the State to make relaxation. Even in cases where relaxation is required to be made extreme caution is to be exercised and a special case has to be made out. But no case as such is made out in the case on hand. Even on this count the impugned G.O. is to be held unconstitutional being violative of Articles 15 and 16.

235. We are however not inclined to examine whether the total reservations in this case go upto 55.75%. It is pleaded, in addition to 15(4) and 16(4) social reservations, 3% is being provided to physically handicapped, ½ % for sports and games and 1/4% for NCC. Whether the aforesaid reservations for physically handicapped, NCC and Sports quota is also vertical and in addition to reservations provided for SC, BCs under Articles 15(4) and 16(4) cannot be critically examined in this case for want of proper pleading and foundational facts. The reservations made under Articles 15(1) and 16(1) cannot be clubbed together with the social reservations made under Articles 15(4) and 16(4). The rule of 50% shall be applicable to only social reservations.

Question 7:

Whether Reservations in favour of Muslims is traceable to Article 15(1) and Article 16(1) of the Constitution of India?

236. Sri K.G.Kannabiran, learned senior counsel appearing on behalf of some of the interveners submitted that Muslims

as a minority in India are entitled to reservation under the equality code of the Constitution as embodied in Articles 15(1) and 16(1). The claim to affirmative action by Muslims need not be rooted through Articles 15(4) and 16(4).

237. We shall examine the submission. The trinity of Articles 14, 15 and 16 forms part of a string of constitutionally guaranteed right to equality. These rights supplement each other.

238. Articles 15(1) and 16(1) do permit reasonable classification for ensuring attainment of equality of opportunity. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Articles 15(4) and 16(4) are instances of such classification. Now it is well settled that Articles 15(1) and 16(1) being facets of Article 14 permit classification. Even without clause (4) in both the articles, it would have been permissible for the State to evolve such a classification and make a provision for reservation of seats in educational institutions and posts in public employment. Articles 15(4) and 16(4) are exhaustive of the concept of social reservations in favour of socially and educationally backward classes of citizens and in favour of backward classes alone. The power of classification implicit in clause (1) of Articles 15 and 16 does not get exhausted but only in exceptional situations given and not for all sundry reasons – that any further reservations, of whatever kind should be provided under clause (1) of Articles 15 and 16. The State has to satisfy that making such a provision was necessary (in public interest)to redress a specific situation (See: **Indra Sawhney's case** (1 supra).

239. The reservations provided in favour of Muslim community if is to be justified under Articles 15(1) and 16(1) and not as a backward class under Articles 15(4) and 16(4), then there has to be a valid classification on grounds other than the religion, race, place of birth, caste etc. The minority status is admittedly claimed on the basis of religion. Any affirmative action only on the ground of religion is expressly prohibited under Articles 15(1) and 16(2) of the Constitution. For the aforesaid reasons, we find it difficult to accept the submissions made in this regard.

240. This question need not detain us any longer for the reason that the State did not provide reservations in favour of the Muslim community under Articles 15(1) and 16(1). It is the specific case of the State that the Muslims have been classified and categorized into backward class both under Articles 15(4) and 16(4) and reservations to seats and posts were accordingly made. The reservations under Articles 15(1) and 16(1) for special categories can be made provided the twin tests of valid classification are satisfied. i.e.

1) classification must be found on an intelligible differentia which distinguishes persons grouped together from others left of the group; and 2) the differentia must have a rational connection to the object sought to be achieved.

241. In the absence of any plea by the State that reservations under Articles 15(1) and 16(1) were made in favour of Muslims as they satisfy the twin tests of valid classification, any further discussion and opinion by us in this regard becomes an academic one.

Our view on certain subsidiary submissions:

242. Party-in-person, Sri Khan Latif Mohd. Khan, made an attempt to justify the reservations on the ground that majority of the Muslim community are poverty stricken and economically poor deserving special provision in their favour. We find no merit in it.

243. Providing social reservations is not part of any poverty alleviation programme by the State. That a backward class cannot be determined only and exclusively with reference to economic criteria. It may be a consideration or basis along with and in addition to social backwardness.

244. Sawant,J in **Indra Sawhney's** case (1 supra) observed "a class which is not socially and educationally backward though economically or even educationally backward is not a back ward class for the purposes of providing social reservations." Hence poverty or mere economic backwardness cannot be a criterion of backwardness for Articles 15(4) and 16(4). The predominant test is the social backwardness.

245. In the light of the authoritative pronouncement, it is difficult to accept the submission based on poverty and economic backwardness.

246. Sri Ghulam Yazdani, learned senior counsel pointed out that the reservations to seats and posts provided by the State is the result of the struggle of Urdu speaking people for their legitimate rights guaranteed under the Constitution. According to him, social reservations provided are part of the programme of safe guards and facilities in favour of linguistic minorities in the state of Andhra Pradesh. We have recorded the submission only for the sake of stating the argument on record. The argument does not merit any serious consideration.

247. The submission made by the learned senior counsel, Sri Gangaiah Naidu, that since the Muslims are already determined and classified as socially backward by the States of Kerala, Karnataka and Tamilnadu and they cannot be otherwise in the State of Andhra Pradesh, and they are required to be classified as such, is untenable and unsustainable. That a caste/community/group, which may be socially backward in one State, need not necessarily be backward in other areas in the country.

Constitutional validity of Section 11(2) of Act 20 of 1993

248. What remains for our consideration is about the constitutional validity of Section 11(2) of Act 20 of 1993. No submissions much less any serious submissions were made demonstrating as to how the provision suffers from any constitutional infirmity. It is well settled that a provision of law can be struck down or declared unconstitutional only on two grounds i.e. to say lack of legislative competence and violation of any of the fundamental rights guaranteed in part-III of the Constitution or by any other constitutional provisions. There is neither any such plea nor submissions made. Therefore, no case as such is made out by the petitioners.

249. The following are our conclusions and answers to the questions dealt with hereinabove:

1(a). The expression "socially and educationally backward classes" in Article 15(4) and the expression "backward class of citizens" in Article 16(4) may include any caste, community or social group which may be identified as socially backward. That a caste is also a class of citizens and if such caste as a whole in its entirety is socially and educationally backward, provisions can be made in favour of such caste on the basis that it has socially and educationally backward class of citizens within the meaning of Article 15(4). The same can be treated as a backward class within the meaning of Article 16(4). Social backwardness may be found in other groups, classes and sections among the populace apart from the caste.

1(b). The Muslims as a group are entitled to affirmative action/social reservations within the constitutional dispensation, provided they are identified as socially and educationally backward class for the purposes of Article 15(4) and backward class of citizens under Article 16(4). Providing social reservations to the Muslim community or sections or groups amongst them in no manner militate against secularism, which is a part of basic structure of the Constitution.

2) The problem of determining who are socially backward classes is a very complex one. The caste which is a social class if found educationally and socially backward for the purposes of Article 15(4), it would be socially and educationally backward class. Similarly, if it is backward socially, it would be a backward class for the purposes of Article 16(4).

The backward classes can be identified on the basis of a caste which is a social class in India provided it is identified to be socially and educationally backward for the purposes of Article 15(4) and backward for the purposes of Article 16(4). There

are no legal or constitutional impediments for identification of the backward classes with reference to caste. However, the requirement is that a rational and scientific criteria must be evolved for determining backwardness and that criteria must be applied to find out whether any caste, occupational groups, classes or sections of people qualify for classifying them as backward classes. If the criteria evolved and applied for identification of the backward classes is found to be improper and invalid, then the classification of socially backward classes based on that criteria will have to be held to be inconsistent with the requirements of Articles 15(4) and 16(4).

In case of non-hindus social backwardness cannot be identified for the purposes of recongnising as socially backward class on the basis of caste in the conventional sense known to hindu society. In all such cases, the part played by the occupation, conventional belief and place of habitation coupled with poverty may play a dominant and significant role in determining social backwardness. No particular procedure or method of identification of backward classes is prescribed. The authority appointed to identify the backward classes is free to adopt such method/procedure as it thinks fit and proper and so long, the method/procedure adopted for the purposes of identification of the backward classes is rational, scientific, fair and adequate, the same may satisfy the constitutional requirement. But in either case, identification of backward classes cannot be based exclusively and solely on the basis of caste.

3) The process of identification of Muslims as a group as socially backward by the Commissionerate of Minorities Welfare is totally vitiated since it did not determine any specific criteria for the purposes of identifying the backward classes and applied the same in order to find out as to whether the Muslims qualify to categorise them as socially backward and as well as backward for the purposes of Articles 15(4) and 16(4). The Commissionerate acted in undue haste. The Commissionerate failed to undertake any serious investigation and enquiry as is required before identifying the Muslim community as a socially backward class. In the absence of laying down the criteria for ascertaining the backwardness, the entire report is to be treated as an exercise in futility. The approach adopted by the authority is improper and invalid. In the absence of any such finding as to the social backwardness, the Muslims cannot be classified as backward classes either for the purposes of Article 15(4) or Article 16(4) of the Constitution of India.

4) That Section 11(2) of Act 20 of 1993 is mandatory in its nature. The State Government is bound to consult the A.P Backward Classes Commission before undertaking any revision of the backward classes list. The expression “revision” includes inclusion or addition of any new class into the list of backward classes. In the absence of such consultation, the State Government in issuing the impugned G.O acted in contravention of the mandatory provision of law. The G.O is, therefore, ultra vires.

5) The creamy layer is required to be excluded in the course of identification of backward classes. Non-exclusion of creamy layer has the same effect of inclusion of forward caste/groups in the list of backward classes. The creamy layer among the Muslim community are not entitled to the benefit of social reservations. The impugned G.O which does not make any provision to exclude the creamy layer from the benefit of social reservations is violative of Articles 14 and 15(1) and 16(1) and also of Articles 15(4) and 16(4) of the Constitution of India.

6) The reservations contemplated in Clause (4) of Article 15 and as well as Clause (4) in Article 16 should not exceed 50% unless to meet extraordinary situations. No case as such is made out in justification of exceeding 50% reservations.

7) The State did not make out that reservations in favour of Muslims were made under Articles 15(1) and 16(1) of the Constitution of India. The plea that reservations can be made in favour of minorities under Articles 15(1) and 16(1) of the Constitution is untenable and unsustainable as the same would amount to making reservations on the basis of religion which is prohibited by Articles 15(1) and 16(2) of the Constitution of India.

8) The determination of backwardness and the process of identification is not a subjective exercise nor a matter of

subjective satisfaction. The exercise is an objective one. The authority entrusted with the task of identification is required to evolve objective, social, sociological and other considerations and apply the same before any group or class of citizens could be treated as backward. That if the body entrusted with the task of identification or for that matter, the Executive includes, for collateral reasons any group or class not specifying the relevant criteria as a backward class, it would be a clear case of fraud on power. The decision is liable to be tested on the touchstone of arbitrariness, irrationality and as well as on the grounds of non-application of mind or perversity or on the ground that it was formed on collateral grounds. The norms and parameters for adjudging the validity of administrative action are applicable for testing the validity of exercise of power and in particular, the action taken under Articles 15(4) and 16(4) so far as the identification of backward classes is concerned; the yardstick is same and not different.

However, formation of opinion regarding adequacy of representation in the services of the State is within the subjective satisfaction of the Government. The State is entitled to form its opinion on the basis of the material it has in its possession already or it may gather such material from a Commission/Committee, person or authority, but even that opinion formed is not beyond the judicial scrutiny altogether. In the absence of existence of the circumstances and the material relevant to the formation of opinion for drawing requisite satisfaction, the decision is challengeable; the judicial scrutiny would be available on the ground of non-application of mind or formulation of collateral grounds. If the formation of opinion is found to be mala fide or is found to be based wholly on extraneous and/or irrelevant grounds, it is liable to be set aside.

The words of Article 16(4) are not simplicitor, “in the opinion of the State” “is not adequately represented” in the services under the State, the State may make provision for the reservation of appointments or posts in favour of backward class of citizens. It is a conditional power and the same can be exercised provided the requisite factual situation which is a condition precedent to the exercise of power exists. Whether condition precedent to the formation of the opinion have a factual basis can always be examined by the Court. However, the sufficiency of the material, reasonableness and propriety cannot be gone into by this Court.

250. In the result, G.O Ms. No. 33, dated 12.07.2004 is struck down as violative of Articles 14, 15(1) and (4), 16(1) and 16(4) of the Constitution of India.

251. The following directions are given to the Government of Andhra Pradesh:

1) The Government of Andhra Pradesh shall forthwith initiate the process of reconstituting the Andhra Pradesh Commission for Backward Classes and complete the same within a period of three months. That immediately upon such reconstitution, the Government shall initiate the process of consultation and seek the opinion of the Commission for inclusion of the Muslim Community into the list of backward classes.

2) The Commission shall examine the requisition/request of the Government and shall decide the same by duly giving its opinion within a period of six months from the date of such requisition/request being made by the State Government. It shall be open to the State Government to forward the entire material in its possession, including the material collected by the Commissionerate of Minorities Welfare for the perusal and consideration of the Backward Classes Commission.

3) The identification of any caste, social group or community involves exclusion of creamy layer. The State of Andhra Pradesh though a party to the decision rendered by the Supreme Court in **Indra Sawhney’s case** (1 supra), so far did not lay down any criteria for identification of creamy layer. In the circumstances, it would be just and necessary to direct the State Government to lay down the criteria for identification of creamy layer so that it could be applied while considering the case of the Muslim Community for identification as backward class. That an appropriate criteria shall be evolved by the Government in terms of the directions of the Supreme Court in **Indra Sawhney’s case** (1 supra). The very process of identification of backward classes involves identification of creamy layer amongst them. The criteria in this regard shall be laid down by the State

Government within a period of three months or in the alternative to follow the criteria laid down by the Government of India in its Memorandum dated 8.9.1993 which has received its affirmation in **Ashok Kumar Thakur vs. State of Bihar (69 supra)** and **Indra Sawhney's case**-II (67 supra), in order to facilitate the expeditious disposal of the claim of the Muslim Community for their identification as a backward class.

252. Writ Petitions Nos. 12239, 12552, 12653, 12744, 13059 and 13113 of 2004 are disposed of in the light of directions and orders contained in this Judgment.

253. Writ Petition No. 13073 of 2004 is dismissed. No order as to costs.

254. Valuable assistance was rendered by

Sri K. Ramakrishna Reddy and Sri D. Prakash Reddy, the learned senior counsel, who lead the arguments. The submissions made by Sri Ramesh Ranganathan and Sri D.V. Sitarama Murthy were equally valuable..

255. Sri D. Sudershan Reddy, learned Advocate General, appearing for the State, was equally helpful in projecting the State's view.

256. Sarvasri K.G. Kannabiran, Dr. Rajeev K. Dhawan,

S. Ramachandra Rao, M.R.K. Chowdary, Ghulam Yazdani,

S. Satyanarayana Prasad, P. Gangaiah Naidu, M.A Bari, Noushad Ali, C.V. Nagarjuna Reddy, K. Balagopal, S. Niranjan Reddy, B. Vijaysen Reddy, S.M. Subhan and Ms. Sofia Begum advanced their arguments on behalf of the interveners and rendered valuable assistance.

257. Sri Challa Sitaramaiah, learned Amicus Curiae, placed a very dispassionate view of the entire matter and the Court acknowledges the valuable assistance rendered by him.

(B. Sudershan Reddy, J)

(A. Gopal Reddy, J)

(K.C. Bhanu, J)

Dated: ..09..2004

msv/ks/pv

JUDGMENT : (by Justice J.CHELAMESWAR for himself)

I have had the advantage of going through the judgment of my learned Brother **Justice B.SUDERSHAN REDDY.** I agree with all the conclusions reached by him on the various issues involved in the present batch of writ petitions. But I wish to add.

The demand on the part of the Muslim minorities in the State of Andhra Pradesh that they should be included in the list of backward classes both for the purpose of educational opportunities and employment under the State is subsisting for the last four decades. When the State of Andhra Pradesh undertook the exercise to identify the backward classes in the year 1968, it appointed a Commission known as the Anantaraman Commission. The said Commission considered among various other claims the claim of the

Muslims as a class to be treated as a backward class of citizens and rejected the same while accepting the claim of two small segments of the Muslim community i.e., ***MEHTAR & DUDEKULA.*** [70]

Even after the claim was negatived by the Anantharaman Commission, the demand, did not abate. In the year 1981, the Council of Ministers of the State of Andhra Pradesh desired to examine the matter afresh. The events that followed thereafter were taken a judicial note of by a Division Bench of this Court.[71]

> "11. The Council of Ministers evidently desirous of doing something for the minorities met on 1.6.11981 to consider two questions, viz., i) inclusion of minorities in the list of Backward Classes; and (ii) the constitution of a Finance Corporation for the minorities. A Sub-Committee of the Council of Ministers was constituted to examine the said issues. The recommendations made by the Sub-Committee were considered by the Cabinet on 16.8.1981 and it was `resolved to constitute a Commission to review the A.P.Backward Classes Commission's Report, 1970 for the purpose of determining socially and educationally backward classes for purposes of arts.15(4 and 16(4) of the Constitution and to examine the inclusion in the list of Backward Classes of any other communities/castes including minorities.'
>
> It was also decided to constitute a Finance Corporation as recommended by the Sub-Committee. A one-man Commission was decided to be set up for the purpose, and the name of Mr.N.K.Muralidhara Rao was approved by the Chief Minister on 5.12.1981. Accordingly, the Government issued G.O.Ms.No.12, dated 22.1.1982 constituting the One Man Commission, known as `Muralidhara Rao Commission'."

The said Commission went into the question along with certain other issues and rejected the claim that the entire community of Muslims should be recognsied as backward class of citizens.[72]

In the year 1993, the Government declared the Muslim community as a backward class along with certain other communities (vide G.O.Ms.No.30, Backward Classes Welfare (P-2) Department, dated 25.8.1994). The said G.O. came to be challenged in this Court. A Full Bench of this Court, in **A.P.State B.C.W.Assocn. v. State of A.P.B.C.W.Deptt. (FB),**[73] considered the legality of the said G.O. The substantial objection against the said G.O. was that it was issued without consulting the Commission created under the A.P.Act 20/1993 (Andhra Pradesh Backward Classes Commission Act). Though the G.O. purported to declare certain communities enumerated therein such as Kapus, Muslims, etc., as backward classes of citizens, the G.O. did not provide any benefit either in the area covered by Article 15(4) or 16(4). Therefore, this High Court concluded that the challenge to the G.O. was premature as the petitioners therein could not have any grievance in the absence of any tangible injury to their interest. All the three Judges construed the G.O. as a request by the Government to the Commission under the A.P.Act 20/93[74] and did not grant any relief to the petitioner. Thus, in substance, the legality of the declaration contained in the said G.O. was not decided.

The Backward Class Commission envisaged in Section 3 of the A.P.Act 20/93 was constituted by G.O.Ms.No.9, Social Welfare Deaprtment, dated 26.1.1994, initially with five members for a period of three years under the Chairmanship of Justice K.S.Putta Swamy, a retired Judge of the High Court of Karnataka. It was reconstituted from time to time. There was no reconstitution of the said Commission and the Commission after 30 September 2002.

Apart from the declaration made by the Full Bench in **A.P.State B.C.W.Assocn. v. State of A.P.B.C.W.Deptt (FB) (supra 4),** that G.O.Ms.No.30, dated 25.8.1994 may be construed as a request by the Government to the Commission, to consider the question whether the communities enumerated therein which include Muslims could be treated as backward classes of citizens, no other material is brought to the notice of this Court whether the Government did in fact make any request to the Commission to examine the question of treating the Muslim community in its entirety as a backward class of citizens. Before the **Full Bench (supra 4),** the then Advocate General stated that "petitions are filed by private parties before the Commission challenging the inclusion of the disputed communities in other backward classes and the said petitions are pending". Proceeding on the basis of this statement, **Justice Y.Bhaskar Rao** observed:

> "**…**Therefore, declaration of the disputed communities by the Government as other Backward Classes is proper or not has to be decided by the Commission ***along with the requisition sent by the Government*** to consider the matters referred to the Commission. Thus, entire matter is now before the Commission."**(emphasis supplied)**

Further, **Justice B.Subhashan Reddy,** observed

> "…In fact, Mr.S.Venkat Reddy, the learned Advocate General made a statement before us that the impugned G.O. will not be given effect to, until such a report is submitted by the B.C.Commission…."

There is, however, no concrete material before this Court to establish whether the government ever sent requisition as stated by **Bhaskar Rao,J** to the Backward Classes Commission on the question.

Nine years thereafter, the Government of Andhra Pradesh by G.O.Ms.No. 33, Backward Classes Welfare (C2) Department, dated 12.7.2004 declared the Muslims as a backward class of citizens and provided a reservation of 5% in favour of them both in educational institutions as well as employment in the government. The G.O. reads as follows :

> The Commissionerate of Minorities Welfare, headed by the Ex-Officio Commissioner, has made an in depth study on the Socio-Economic and Educational Conditions of Muslim Community in the State and submitted his report to Government.
>
> The study focused mainly on the living conditions, occupational profile, income and literacy levels and participation in social activities. The said study was done through the District Minorities Welfare Officers and the officials of A.P. State Minorities Finance Corporation. The previous material and study on the Socio-Economic conditions of minorities in the State made by the A.P.State Minorities Commission was utilized by the Commissioner of Minorities Welfare in preparing the above said report on the Socio Economic conditions of Muslim Minorities in the State.
>
> According to the 1991 census the population of Minorities in A.P. State is 72 lakhs (i.e.., 11% of total population). Out of which Muslim population is around 64 lakhs consisting of 8.5% of total population. The survey mainly focused on Educational, Economical, Social aspects.
>
> The study report of Commissioner of Minorities on Socio-Economic condition of Muslim minorities revealed that around 65% of Muslims are living below poverty line (i.e., annual income Rs.11,000/- or below) and 16% are living under double poverty limit (i.e., annual income is Rs.44,500/- or below). The literacy rate among Muslim Minorities is only 18% as against 44% rate among other communities in the State as per 1991 Census. The literacy rate among Muslim women is very poor, which is only 4%.
>
> The study revealed that most of the Muslims are engaged in petty business activity (viz., Pan Shop, Chai dukan, selling of fruits and flowers, as labourers in Engineering Work shops, watch servicing and repairs of Radio & T.V. etc.,) in addition as Rural artisans. The study report of Commissioner of Minorities Welfare revealed that the Socio-Economic Conditions of Muslim Minorities Community in the State are very poor due to poverty, illiteracy and in adequate representation in various fields of the society. The Commissioner of Minorities Welfare has finally recommended to provide 5% (five

percent) reservations to Muslim Minorities in Employment and Educational Institutions.

The Government, after careful consideration of the recommendations made by the Commissioner of Minorities Welfare, hereby accept the same and order that Muslims in the State be provided with 5% (five percent) reservations in educational institutions and employment in the State, over and above the reservations presently provided to the Backward Classes and be treated as Backward Classes under Category E (in addition to the existing A,B,C,D categories.)

The General Administration (Services), Health, Medical and Family Welfare, Labour & Employment, Higher Education and School Education Departments are requested to make necessary amendments to the rules and regulations in this regard.

These orders will come into force with immediate effect.

It is the constitutionality of this G.O. that is in question in these writ petitions.

Before examining the various questions involved in the case, it would be appropriate to examine the legal background of the question of ***`reservations'.***

The preamble to the Constitution declares the philosophical objects sought to be achieved by the Republic of India under constitutional government. One of the objectives is to secure to all its citizens equality of status and opportunity. Article 14 mandates that the State shall not deny to any person equality before Law. Articles 15 and 16 are manifestations of Article 14 in two of its various facets. While Article 15 prohibits discrimination against any citizen on grounds of religion, race, caste, sex, place of birth or any of them in matters of social inter-course, Article 16 prohibits any discrimination on any one of the above mentioned grounds in the matters of employment or appointment to any office under the State. The amplitude and contours of the above mentioned Articles have been the subject matter of a great deal of judicial pronouncements which are too well known and any reference to them at this stage in my view would be an "idle parade of a familiar learning." Both the above mentioned articles expressly preserve the authority of the State to make special provisions for the advancement of backward classes of citizens.[75]

Thus, Articles 15 and 16 of the Constitution envisage a majestic code of equality for all the citizens of India both in the matters of social inter-course and employment under the State duly taking into consideration that certain classes of citizens labour under certain disadvantages and therefore cannot be called upon to compete on par with the rest of the members of the society.

Both the Articles speak of "backward class of citizens". While 15(4) makes a further mention of SCs and STs, Article 16(4) does not make any reference to the SCs and STs.

The Constitution itself under Part XVI recognizes the need to make certain special provisions with regard to SCs and STs and the Anglo-Indian communities in the matter of representation in the House of People (Lok Sabha) and the Legislative Assemblies of the States and the need to take into consideration the claims of the members of the SCs and STs while making appointments to services and posts in connection with the affairs of the Union and the States. The expressions Scheduled Castes and Scheduled Tribes are defined under Article 366(24) and 366(25) respectively. The power and procedure to identify the Scheduled Castes

and Scheduled Tribes is also expressly provided under Article 341 and 342 respectively.

The Constitution does not impose any such express obligation with respect to the backward classes of citizens. It contains certain provisions like Article 15(4) and 16(4) enabling the State to make special provisions for the benefit of backward classes as and when the State feels the necessity. The expression `backward class of citizens' is not defined under the Constitution, nor the procedure for identification of such classes of citizens prescribed under the Constitution. Therefore, it becomes the obligation of the State to make a proper identification of the backward classes of citizens through a constitutionally permissible procedure. This area of identification of such segments of the backward classes referred to above resulted in litigation as and when an attempt was made to identify some sections of the society as backward classes either for the purpose of Article 15(4) or 16(4) or both.

While Article 15(4) enables the State to make special provision for the advancement of any "socially and educationally backward classes" of citizens, Article 16(4) enables the State to make provision for the reservation of appointments or posts in favour of any "backward classes of citizens" who in the opinion of the Sate are not adequately represented in the service of the State.

For a long time, it was assumed that backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, mentioned in Article 15(4). **See Indra Sawhney v. Union of India[76] at para 786.** However, the majority of a Nine Judge Bench of the Supreme Court in **Indra Sawhney v. Union of India (supra 7),** made it clear for the first time that such an assumption was without any basis and the amplitudes of Article 15(4) and 16(4) are different. At para (787), it is held :

> **"787.** It is true that no decision earlier to it specifically said so, yet such an impression gained currency and it is that impression which finds expression in the above observation. ***In our respectful opinion, however, the said assumption has no basis. Clause (4) of Article 16 does not contain the qualifying words "socially and educationally" as does clause (4) of Article 15.*** It may be remembered that Article 340 (which has remained unamended) does employ the expression 'socially and educationally backward classes' and yet that expression does not find place in Article 16(4). The reason is obvious: "backward class of citizens" in Article 16(4) takes in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. ***Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens for the purposes of Article 16(4).*** It is equally relevant to notice that Article 340 does not expressly refer to services or to reservations in services under the State, though it may be that the Commission appointed thereunder may recommend reservation in appointments/posts in the services of the State as one of the steps for removing the difficulties under which SEBCs are labouring and for improving their conditions. ***Thus, SEBCs referred to in Article 340 is only of the categories for whom Article 16(4) was enacted:*** Article 16(4) applies to a much larger class than the one contemplated by Article 340. ***It would, thus, be not correct to say that 'backward class of citizens' in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4).*** Saying so would mean and imply reading a limitation into a beneficial provision like Article 16(4)." **(emphasis supplied)**

It is already noticed that the Constitution nowhere defines the expressions "backward class of citizens" or "socially and educationally backward classes of citizens", nor does the Constitution prescribe any procedure by which either of the above mentioned classes of citizens are to be identified unlike the case of the Scheduled Castes and Scheduled Tribes. The responsibility of such identification of such class of citizens is left to the State. Therefore, the various State Governments and the Government of India from time to time,

adopted the procedure of appointing Commissions under the Commissions of Enquiry Act, 1952 for the purpose of identifying backward classes of citizens. There were departures occasionally and the State Governments themselves embarked on such an exercise. Those various Commissions evolved their own procedures and adopted different parameters for the purpose of identifying backward class of citizens. Starting from the case of **M.R.Balaji v. State of Mysore**[77] till the case of **Indra Sawahaney v. UOI (supra 7),** one of the principal questions debated by the Supreme Court and for that matter by various High Courts was whether the parameters set by each of those Commissions were legally relevant and permissible.

The Supreme Court, therefore, thought it fit in **Indra Sawahaney's case (supra 7)** to direct the States and the Government of India to create permanent bodies in the nature of either a Commission or Tribunal with experts in the field "to make a proper and effective enquiry" **(See para 847 in *Indra Sawahaney v. UOI* – supra 7),** the various factors which weighed with the Supreme Court for issuing such a direction are the complexity inherent in the process of identification of backward classes, and the need to periodically review the list of backward classes of citizens in order to include new classes or exclude some of the existing classes whenever the State feels the necessity and also the need to examine complaints of over inclusion or under inclusion in the list of backward classes maintained by the Government, Above all the need to have a informed and rational examination of such questions. Para (847) of the judgment cited supra, is relevant:

> **"847.** We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of *Other Backward Classes* can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, ***it must record its reasons therefor. Even if any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective inquiry.*** It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. ***Such a body can be created under clause (4) of Article 16 itself — or under Article 16(4) read with Article 340 — as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at Central level and at the level of the States within four months from today.*** They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature aforementioned, if any, received. It should be open to the Government of India and the respective State Governments to devise the procedure to be followed by such body. The body or bodies so created can also be consulted in the matter of periodic revision of lists of OBCs. As suggested by ***Chandrachud, CJ in Vasanth Kumar-1985 Supp SCC 714*** **there should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case my be.** ***(emphasis supplied)***

In my view, two legal obligations emerge from the above (1) to create a permanent body (Commission/Tribunal) with power to examine the complaints of wrong inclusion or non inclusion of groups, classes and sections in the Lists of Backward Classes and make appropriate recommendations. (2) if any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation.

The rationale behind the said direction, it appears to me to be that the power of the State in identifying the backward class of citizens should not be an unguided and uncanalised power, but must be a power to be exercised on the basis of some genuine data and a rational analysis[78] of the same, to ensure

that the identification of backward classes of citizens is made by a body independent of the government without any concern for the political overtones of the decision and the electoral fortunes (good or bad) that accompany. However, the Supreme Court was conscious of the fact that the recommendations made by such body composed of a few individuals, however, eminent they might be cannot be made final as in the final analysis, the implementation of the constitutional obligations is the responsibility of the elected legislatures and the political executive which is answerable to the people through the Legislature, therefore held

> "its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefore." [79]

recognizing the authority of the State to reject the recommendations of the Commission for valid reasons to be recorded.

Pursuant to the said directions, both the Union of India and the State of Andhra Pradesh made an enactment each and discharged the 1st of the obligations (in law) mentioned above. It is a different question whether the obligation is discharged as a matter of fact and I shall deal with the same later in this judgment. For the purpose of the present case, we are concerned only with the local Act called the Andhra Pradesh Commission for Backward Classes Act, 1993.

A brief survey of the scheme of the Andhra Pradesh Commission for Backward Classes Act 20 of 1993 is required. Section 3 of the Act contemplates the constitution of a body known as Andhra Pradesh Commission for Backward Classes. The purpose of the constitution of such a body is to enable such a Commission to exercise the various powers conferred on the Commission under the said Act and also to perform the various functions assigned to it under the said Act. Sub-Section (2) of Section 3 deals with the composition of the Commission and the qualifications of the various classes of persons required to be appointed as members of the Commission. Section 4 stipulates that every member (by definition includes the Chairman) shall hold office for a term of three years. Sub-Section (3) authorizes the government to remove any member on any one of the contingencies enumerated therein after complying with the principles of natural justice. Section 9 of the Act deals with the functions of the Commission. They are (1) that the Commission is obliged to examine the request for the inclusion of any class of citizens as a backward class in the "list". (2) hear complaints of over inclusion or under inclusion of any backward class (3) the Commission is also under an obligation to examine and make recommendations on any matter relating to the backward classes and if the government makes a reference to it in that regard. (4) The Commission is also obligated to enquire into specific complaints regarding the non-observance of the existing rules of reservation either in the educational institutions or in the matter of appointment to the posts in the service under the State Government, local or other authorities and report to the government.

Section 11 of the Act contemplates a periodic revision of the list maintained by the State Government with a view to excluding from such a list, those classes who have ceased to be backward classes or for including in such lists new backward classes. Sub-Section (2) of Section 11 mandate that the government shall consult the Commission while undertaking any revision. Section 11(1) mandates that such a revision is required to be undertaken at the expiration of ten years from the commencement of the Act and in every succeeding period of 10 years thereafter and apart from that Section 11 also authorizes the government at any time to revise the lists. In other words, while the examination of the existing lists with a view to consider whether any one of the groups of citizens include in the list is required to be excluded or whether any new group of persons are required to be added to the existing list, is mandatory at the end of every block of ten years after the commencement of the Act, the provision does not preclude the government from undertaking the revision at any point of time if the government feels the necessity to undertake such an exercise. The mandate of sub-Section (2) is that whenever such an exercise is undertaken the government is required to consult the Commission.

It is in this legal background the questions arising in the present batch of cases are required to be examined.

One of the submissions in these writ petitions is that in view of the fact that the impugned G.O. recognises the entire Muslim community as a backward class it would tantamount to a reservation on the basis of religion and therefore such reservation is violative of Article 14, 15(2) and 16(2) of the Constitution of India. It must be stated here that though in some of the writ petitions, there is a pleading to this effect, no serious argument in this regard is advanced by any of the learned counsel for the petitioners. Learned Advocate General, on the other hand, argued that the impugned G.O., though it creates a reservation in favour of Muslim community in the matters of admissions into educational institutions and employment under the State, such a reservation is provided treating them as a backward class of citizens within the meaning of that expression under Article 15(4) and 16(4) but not because of the fact that they follow a particular religion. He therefore submitted that such a reservation cannot be called a reservation or a preferential treatment on the basis of religion.

The fact that Muslims or for that matter Christians and Sikhs etc., are not excluded for the purpose of conferring the benefits under Articles 15(4) or 16(4) was recognized at the earliest by the Supreme Court in **M.R.Balaji v. State of Mysore (supra 8).** Though the question was not directly in issue, the possibility of these groups of people being treated as backward class of citizens for the purpose of Articles 15 and 16 was not ruled out in the following words :

> "Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, the test would inevitably break down in relation to many sections of Indian society which do not recognise castes in the conventional sense known to Hindu society. ***How is one going to decide whether Muslims, Christians or Jains or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Article 15(4).*** It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be

> socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or class of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty, to a very large extent .. .. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens."

Again in **Indra Sawhney's case (supra 7),** the Supreme Court once again observed the possibility of the Muslim community as a whole being found socially backward. At para (782), it is held as follows :

> "…..Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward….."

In substance, the Supreme Court held that while in the case of identifying the backward classes of citizens among the Hindus, caste is a relevant factor, though not the only or dominant factor, the Court did not rule out the possibility of the identification of a class of citizens on the basis of various other factors like the occupation, religion etc. The Supreme Court observed in **Indra Sawhney's case (supra 7)**

"one has to begin somewhere…….with some group, class or section."

It is only an identification tag and a preliminary step in the identification of a backward class of citizens.

> "……Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does – what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace…."

For the same reason, I do not find any legal infirmity in identifying a group or section of people by their profession or calling or the religion they follow. The next step is to examine whether such a class in its entirety answers the description of a backward class of citizens within the meaning of the Articles 15(4) or 16(4). The initial step of identifying a section of the society on the basis of the religion they follow is only an identification of a class of citizens, but not identification of a backward class of citizens. In my view, such an exercise is perfectly justified and within the parameters of the law laid down by the Supreme Court in this regard. Therefore, the submission is required to be rejected.

Apart from that the challenge to the G.O. is mainly on the following grounds.

(1) that in view of the decision of the Supreme reported in **Indra Sawahaney v. UOI (supra 7)** and the provisions of the Act 20 of 1993, the mandatory requirement of prior consultation with the Commission constituted under the above mentioned Act is not complied with.

(2) that there is no discernible basis for the government to come to a conclusion that the Muslim population in the State of Andhra Pradesh in its entirety is a backward class either for the purpose of Article 15(4) or 16(4) or both.

(3) that the 5% reservation in favour of the Muslims in the impugned G.O., coupled with the existing reservation either under 15(4) or 16(4) in favour of the various backward classes in the State of Andhra Pradesh would exceed the permissible limit of 50% of reservations.

(4) the reservation in favour of the entire Muslim population without first identifying the creamy layer would be contrary to the provisions of Article 14, 15 and 16 as laid down by the Supreme Court in **Indra Sawahaney's case (supra 7).**

On the other hand, the case of the government and the various respondents including the respondents who got impleaded themselves in these various writ petitions with a view to support the impugned order is as follows:

(1) In view of the long pending demand of the Muslim community of Andhra Pradesh that they be classified as backward class of citizens for the purpose of extending the benefits contemplated under Article 15 and 16, a meeting was held on 2nd June, 2004 in the chambers of the Chief Secretary, wherein it was resolved as follows :

> "5. It was finally resolved to entrust the issue to some Governmental Organisation/authority, preferably to "Commissionerate for Minorities Welfare" headed by Ex-Officio Commissioner working under the administrative control of Minorities Welfare Department to examine the Socio-Economic and Educational conditions among Muslim Community by utilizing the material, if any, available with the Commissionerate or with any other Commission or by studying the issue further, if necessary and to submit a report to Government whether the Socio-Economic and Educational Conditions of Muslim Community warrant reservations for them in Employment and Educational Institutions on par with other B.Cs in the State."

Pursuant to the said resolution, the Ex-Officio Commissioner of Minorities Welfare submitted a report wherein he recommended that 5% reservation be given to the Muslims both in the matters of educational opportunities and employment. The Government accepted the report and the recommendations and issued the impugned G.O.

(2) It is the stand of the Government that the consultation with the Commission constituted under Act 20 of 1993 is not mandatory. In the alternative, it is submitted by the learned Advocate General, that in view of the fact that the Commission constituted under Act 20/1993 though was in existence for a period of 7 ½ years before which the claim of the Muslim community was pending did not make any recommendation either accepting or rejecting the claim, the government had no option but to take a decision on the basis of another report submitted by the Commissioner of Minorities referred to earlier.

With regard to the third submission, it is stated at para (10) of the counter affidavit that

> "the existing percentage of reservations to SCs, STs and BCs comes to 46% and by providing 5% reservation to Muslim minorities the total reservations comes to 51% which is well within the parameters of the law laid down by the Hon'ble Supreme Court."

The counter affidavit is silent regarding the 4th submission made by the petitioners. The further details of the various ancillary submissions under each one of the above heads made will be considered at appropriate

place.

The first complaint of the writ petitioners is that before the impugned G.O. is issued the State Government did not consult the Commission constituted under the above mentioned Act nor any recommendation was obtained from the said Commission – which is mandatory in view of the directions of the Supreme Court extracted earlier and Sections 9 and 11, more particularly Section 11(2) of the above mentioned Act.

> **"9. Functions of the Commission :** (1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such list and tender such advice to the Government as it deems appropriate;
>
> (2) The Commission shall examine and make recommendations on any other matter relating to the backward classes that may be referred to it by the Government from time to time;
>
> (3) It shall be competent for the Commission at the request of the Government to make an interim report in regard to any castes or classes in whose cases urgent action under the Act is, in the opinion of the Government, necessary. Any action taken by the Government on the basis of such report shall be subject to review with prospective effect as and when the final report of the Commission is received;
>
> (4) The Commission shall enquire into specific complaints with respect to the non-observance of the rule of reservation in the admissions into educational institutions and also reservation of appointments to posts/services under the Government and other local authority or other authority in the State, as applicable to the listed Backward Classes and furnish its report to the Government.
>
> **11. Periodic revision of list by the Government.-** (1) The Government may at any time and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.
>
> (2) The Government shall while undertaking any revision referred to in sub-section (1) consult the Commission."

The petitioners submitted that in view of the language of Section 11(2), the Government is under a statutory obligation to consult the Commission apart from the obligation emanating from the directions of the Supreme Court which are already noticed earlier.

The State of Andhra Pradesh took the stand in this regard that consultation with the Backward Class Commission is mandatory in the normal circumstances, but in view of the fact that the demand of the Muslim community for providing reservations was subsisting for a period of almost four decades, the same was pending with the Backward Class Commission for a period of 7½ years, and as the Commission did not make any recommendation in that regard and from 1st October, 2002 onwards, the Commission became defunct as no nomination of members to the Commission was made, the State thought it fit to make its own investigation with respect to the desirability of making a special provision both for the purpose of Article 15(4) and 16(4). Therefore, the Ex-Officio Commissioner of Minorities Welfare (an officer of the State of Andhra Pradesh), was called upon to study the social and economic conditions of the Muslims in the state of Andhra Pradesh and submit a report. Pursuant to the said decision, the Commissioner of Minorities Welfare undertook a study of the

socio-economic conditions of the Muslims in the State of Andhra Pradesh and submitted a report. The conclusion of the Ex-Officio Commissioner is "the study revealed that the main reason for backwardness among Muslim minorities are poor economical status, illiteracy particularly among women, inadequate representation in employment, limited representation in local bodies and political spheres etc." He therefore recommended reservation to Muslim minorities in "employment, educational and other fields on par with the backward classes in the State." The State Government accepted the said recommendation and issued the impugned G.O. The learned Advocate General submitted that the identification of the Muslim minorities as a backward class is on the basis of a rational study and therefore cannot be faulted. There was a substantial compliance with the directions of the Supreme Court and with the spirit of Section 11 of the Backward Class Commission Act, 1993. In the alternative, the learned Advocate General submitted that in view of the fact that the issue of providing reservations for Muslim minorities was under consideration by the Commission created under Act 20 of 1993 for 7 ½ years without any recommendation whatsoever by the Commission, there arose a situation of necessity to take a decision such as the one taken in the impugned order without waiting any further for the opinion of the Commission. He further submitted that it was a situation of impossibility to comply with either the directions of the Supreme Court or the mandate of Section 11(2) of Act 20 of 1993. He submitted that the settled legal principle that the law does not expect the impossible to be performed applies squarely to the situation on hand.

The admitted fact is that that the Backward Class Commission headed by **Justice Puttaswamy** did not express any opinion regarding the desirability of inclusion of the Muslim community in the list of backward classes, throughout its existence. The Commission became defunct with effect from 1st October, 2003 as the term of the then existing members came to an end and no member, which expression by definition under section 2(e) includes the Chairman was ever appointed.

It is in the abovementioned background, that the Government thought it fit to call upon the Ex-Officio Commissioner, Minorities Welfare, to submit a report regarding the "socio-economic conditions among Muslim community" and also report whether such conditions "warrant reservations for them in employment and educational institutions on par with other Backward classes in the State." (See para 5 of the Resolution dated 2.6.2004 of the Meeting held in the Chief Secretary's Chambers). In substance, the State called upon one of its officers to examine the claim whether the Muslim community could be treated as a `backward class of citizens' for the purposes of both Aritcles 15(4) and 16(4).

Whether consultation with the Backward Classes Commission is mandatory ?

The obligation to consult such a Commission in my view flows from the directions of the Supreme Court in **Indra Sawahaney's case (supra 7).** Those directions are only an expression of the implied limitations on the power of the State to identify the backward classes of citizens. Such an implication is inherent in the

nature of the power as any irrational exercise of such power would violate the guaranteed rights of the citizens under Articles 14, 15 and 16 of the Constitution of India. The need for such implication is more in view of the fact that in the various judgments commencing with **Balaji's case (supra 8) to Indra Sawahaney's case (supra 7)**, the Supreme Court held that the identification of backward classes is well within the authority of the Executive Government and needs no legislative decision. It is only in recognition of such an obligation, the A.P. Legislature enacted Act 20/93. The obligation is embodied in Section 11(2).

It was held in **Election Commission,In Re : Special Reference No.1 of 2002**[80] at para(149) as follows:

> **"149.** In determining the question whether a provision is mandatory or directory, the subject-matter, the importance of the provision, the relation of the provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get the real intention of the legislature by carefully attending the whole scope of the provision to be construed. The key to the opening of every law is the reason and spirit of the law, it is the *animus impotentia*, "the intention of the law-maker expressed in the law itself, taken as a whole". [See **Bratt v. Bratt - (1826) 3 Addams 210 (Addams at p. 216).]**"

A more specific question whether an obligation imposed under a Statute on the part of the decision-making authority to consult some other specified body is mandatory or directory is required to be answered in the light of the object sought to be achieved by such consultation and the context in which the prescription is made.

In **Narayanan Sankaran Moss v. State of Kerala**[81]**,** the Court held that a power to revoke a licence under Section 5 of the Indian Electricity Act, 1910, is circumscribed by various conditions precedent before the power is exercised and one of the limitations was a consultation with the "Board" stipulated under Section 4. Examining whether such a consultation is mandatory or directory, the Court held that such a consultation is mandatory having regard to the object sought to be achieved by such prescription and also the context in which such a prescription is made. **[See para (20) of the judgment]**[82]**.**

In **Chandra Mohan v. State of U.P.**[83]**,** a Constitution Bench dealing with the question of the obligation arising under Article 233 of the Constitution on the part of the Governor to consult the High Court while making appointment of District Judges, examined the purpose behind such a prescription of the consultation/object and came to the conclusion that consultation is mandatory. **[See also paras (12) and (16) in (2002) 8 SCC 1].**[84]

On the other hand, the learned Advocate General relied on the judgment of the Supreme Court in **L.Hazari Mal v. I.T. Officer**[85]**.**

In **L.Hazari Mal's case (supra 16)**, the Supreme Court was considering the question whether the obligation on the part of the Commissioner of Income Tax to consult the Central Board of Revenue was

mandatory or directory. On a consideration of the relevant provisions of the Patiala Income Tax Act, the Supreme Court came to the conclusion that the obligation is only directory. In coming to such a conclusion, the Court examined some of its earlier decisions i.e., **State of U.P. v. Manbodhan Lal Srivastava**[86] **and K.S.Srinivasan v. Union of India**[87] and noticed that in all those decisions, the Supreme Court relied upon the earlier decision of the Privy Council in **Montreal Street Railway Co. v. Normandin**[88] where the Privy Council held as follows :

> "... The question whether provisions in a statute are directory or imperative has very frequently arisen in this country., but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in *Maxwell on Statutes*, 5th Edn., p. 596 and the following pages. ***When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable,*** not affecting the validity of the acts done."

It can be seen from the above that the Courts are required to hold the process of consultation only to be directory, but not mandatory (1) if by holding a particular provision requiring consultation, to be mandatory and consequentially to hold the acts done in derogation of such an obligation null and void would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and (2) such a construction would not promote the main object of the Legislature,.

I do not see any conflict in the decisions relied upon by the learned counsel for the petitioners and the learned Advocate General and the learned counsel for the interveners supporting the impugned G.O. All these decisions point out that it is the purpose that is sought to be achieved by imposing the obligation of consultation which is required to be examined as appearing for the scheme of the act. The two tests enunciated by the Privy Council in the decision referred earlier **(supra 19)** which justify the conclusion that an obligation to consult is only directory, in my view are not mutually exclusive. Only in those cases where the Court comes to the conclusion that both the tests are satisfied, the Court can reach to a conclusion that the requirement of consultation is only directory, but not mandatory.

If those two tests are applied to the facts of the present case, no doubt that by holding that the consultation with the Backward Classes Commission is mandatory, it would cause serious inconvenience to the beneficiaries of the impugned G.O., i.e., the Muslim community, as they had no control over the government to compel the government to consult the Backward Classes Commission. But, at the same time, the 2nd test indicated by the Privy Council, in my view, would not be satisfied if the consultation process is held only to be directory. Such a construction would not promote the scheme of the Act 20/93 which was enacted pursuant to a direction of the Apex Court. Its already indicated earlier in this judgment, the purpose behind such a stipulation of consultation is to ensure rationality in the decision-making process of identifying backward classes of citizens both for the purpose of Article 15(4) and 16(4). Any irrational decision in this regard would infringe the fundamental rights of the citizens other than the beneficiaries of such irrational decision. Therefore,

in my view, it is not open for the State to argue that the requirement to consult the Commission is not mandatory.

A few ancillary submissions regarding the obligation of the State to consult the Backward Class Commission before identifying a backward class and extending the benefits contemplated under Article 15(4) or 16(4) are made by the learned Advocate General and the interveners.

The first submission is that in view of the fact that though the issue of identifying the Muslim community as a backward class was pending with the Backward Classes Commission for a long time and as the Commission did not make any recommendation either way, coupled with the fact that the Commission itself has become defunct with effect from 1.10.2003, a situation of necessity compelling the State Government to issue the impugned order without consulting the Backward Class Commission arose as it became impossible for the State Government to comply with the mandate of the Act 20/93 or the directions of the Supreme Court in ***Indra Sawhney's case*** **(supra 7)** in this regard. The decision of the Supreme Court reported in ***Presidential Poll Re***[89] was relied upon in support of the proposition "that the law does not expect the impossible to be performed." On the other hand, Sri Ramesh Ranganathan, one of the learned counsel for the petitioners brought to the notice of this Court a judgment rendered in ***Southwark L.B.C. v. Williams (C.A.)***[90]

The question of impossibility to comply with the mandate of Statue and the consequences thereof fell for consideration of the Supreme Court above judgment **(supra 20)**. A Seven Judge Bench of the Supreme Court speaking unanimously through the then Chief Justice Ray, in this context held as follows :

> "……The maxim of law *impotentia excusat legam* is intimately connected with another maxim of law *lex non cogit ad impossibilia. Impotentia excusat legam* is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See *Broom's Legal Maxims* 10th Edn. at pp. 162-163 and *Craies on Statute Law* 6th Edn. at p. 268).

It can be seen from the above that an incapacity to comply with the mandate of the law should arise out of ***"circumstances over which the persons interested had no control like, the act of God."***

In the present case, it is not the situation. The Andhra Pradesh Backward Class Commission Act clearly obligates the State Government to appoint suitable members to man the Backward Class Commission. No act of God is involved in making the Backward Class Commission defunct. It is just that the Government did not have the necessary political will to appoint the members of the Backward Class Commission after

1.10.2003. Therefore, in my view, it is not open for the Government to argue that the obligation to consult the Backward Class Commission is rendered impossible of compliance by virtue of circumstances over which they have no control. Apart from that, as already indicated earlier in this judgment, the government never made any specific reference to the Commission, regarding the desirability of including the Muslim community in its entirety in the list of Backward Classes. At the cost of repetition, I must say that no material whatsoever is placed before this Bench to demonstrate that as a matter of fact, such a reference was ever made and the views of the Commission were sought.

In the alternative, this Court is invited to consider a submission that there arose a situation of necessity which prompted the Government to issue the impugned order without complying with the requirement of consulting the Backward Class Commission as in the view of the Government, it was an urgent situation which called for immediate action on the part of the government as the claim of the Muslim community was pending for four decades. The Law relating to Doctrine of Necessity was examined by a Court of Appeal in **Southwark L.B.C. v. Williams (supra 21)**[91]**.** Dealing with that doctrine, the Court of Appeal, held that the doctrine is required to be invoked in case of extreme peril and in cases of emergency. Even in those cases, the doctrine is required to be carefully circumscribed. Otherwise, such plea would be an excuse for all sorts of wrong doing.

I am conscious of the fact that the judgments of foreign courts are not precedents that bind us. But, the legal principles enunciated by the superior courts of the countries where *Anglo-Saxom* jurisprudence is followed, certainly are of valuable guidance more particularly, the English judgments, as all these concepts of "necessity" and "impossibility of performance" are doctrines inherited by us from the British just as we have inherited the present legal system which are recognized and applied in appropriate cases by the Constitutional Courts of the country.

In the present case, I do not see any reason to permit the State to plead the ***doctrine of necessity*** as it was a `necessity' created by the government by not appointing members to the Backward Class Commission and not insisting on a timely submission of a report by the Commission. The present case, in my view, is a classic illustration of the statement of Lord Denning

> ***"....who would imagine that they were in need, or would invent a need, so as to gain ....."***

Another submission by the learned Senior Counsel for one of the interveners Mr.S.Satyanarayana Prasad is that though the Supreme Court directed the creation of a permanent body for advising the State in the matters of identification of backward classes in ***Indra Sawhney's case (supra 7)***, the direction given must be understood only in the context of identifying the backward classes for the purpose of Article 16(4) as the Supreme Court was dealing in ***Indra Sawhney's case (supra 7)*** only with the aspect of reservations in the

context of Article 16(4), but not Article 15(4). It is further submitted in this context that even on the language of Act 20/93 more particularly Sections 2(a) and (d) r/w Sections 9 and 11 of the Act only lead to such a conclusion. It is further submitted that both Section 9(1) and 11(1) of Act 20/93 employ the expression "backward classes" and "lists", defined under the Act under Sections 2(a) and (d) respectively which read as follows :

> **"2. Definitions :** In this Act unless the context otherwise requires,
>
> **(a) "backward classes"** for the purpose of this Act, means such backward classes of citizens of Andhra Pradesh other than the Scheduled Castes and the Scheduled Tribes as may be specified by the State Government in the lists;
>
> **(b) xxx**
>
> **(c)** xxx
>
> **(d) "lists"** means lists prepared by the Government from time to time for the purposes of making provision for the reservation of appointments of posts in favour of the backward classes of citizens which, in the opinion of the Government, are not adequately represented in the services under the Government and in any local authority or other authority in the State;

and therefore the expression "backward classes" wherever it occurs in the Act must be understood to mean such backward class of citizens of Andhra Pradesh as may be specified by the State Government in the lists (excluding Scheduled Castes and Scheduled Tribes) and the definition of the expression "lists" clearly speaks of lists prepared by the Government for the purpose of making provision for the reservation of appointment of posts and therefore they are only "lists" prepared for the purpose of making special provision contemplated under Article 16(4) only, but not a list of backward class of citizens in whose favour special provision under Article 15(4) could be made. Therefore, it is argued that the impugned G.O., insofar as it makes a special provision in favour of the Muslims in those areas covered by Article 15(4) cannot be called illegal on the ground that before identifying Muslims as a backward class of citizens for the purpose of making a special provision in the form of reserving 5% of the seats in the educational institutions Backward Class Commission was not consulted, as there was no such obligation created under A.P.Act 20/93.

This argument is required to be rejected for two reasons. Firstly, assuming that on the construction of the provisions of Act 20/93 as submitted by the respondents, there is no obligation on the part of the State to consult the Commission while making a special provision in the areas covered under Article 15(4) of the Constitution, the obligation to consult an independent permanent body is implied in the very nature of power under Article 15(4) and 16(4) as directed by the Supreme Court in **Indra Sawahaney's case (supra 7) at para (847)** still remains. In my view, the obligation to comply with the direction of the Supreme Court contained in para (847) and also at para 861(a) of the judgment still subsists. In my view, such a direction is only an expression of the implied obligation inherent in the nature of power under Article 15(4) and 16(4). It is also to be noticed here, though **Indra Sawahaney's case(supra 7)** was dealing with reservations under Artilce 16(4), in subsequent cases reported in **Anil Kumar Gupta v. State of U.P.**[92] and **Preeti Srivastava v. State of Madhya Pradesh**[93]**,** the Supreme Court opined that the principles enunciated and the reasons given in **Indra Sawhaney's case (supra 7),** would be equally applicable to the reservations under Article 15(4). While in the

earlier case **(Anil Kumar Gupta's case – supra),** the Court was dealing with the permissibility of creating horizontal reservations, in the latter case **(Preeti Srivastava's case–supra 23)**, the Court was dealing with the aspect of a concession in favour of the backward classes in fixing the lower criteria of eligibility for admission to a post-graduate course. In both the cases, the Court adopted the logic applied by the Larger Bench in **Indra Sawhaney's case (supra 7).** Though the aspect of creation of a permanent body and the consultation with the said body for the purpose of making a special provision under Article 15(4) did not directly fall for the consideration of the Supreme Court in either of the cases, these two judgments in my view are authority for the proposition that the limitations on the power of the State both in areas of Article 15(4) and 16(4) are the same. No doubt, the language of Section 9(2) and 9(4) (which are already extracted earlier) indicate that on a literal construction of the Act in the light of the definition of the expressions "lists", the Act deals only with the areas covered under Article 16(4). But Section 9(4) indicates that the Commission is under a legal obligation to examine complaints of non-implementation of the reservations in the educational institutions. Therefore, the functions of the Commission are not only confined to examination of the areas covered under Article 16(4) alone, but also extended to at least some areas covered by Article 15(4). Apart from that, the language of sub-section (2) of Section 9 which makes it imperative for the Commission to make recommendations on any other matter relating to backward classes that may be referred to it by the Government. Making special provision regarding the areas covered under Article 15(4) is certainly `a matter relating to backward classes' and if referred by the Government, the Commission is bound to consider. The next question is whether the State has an option while making such a special provision either to consult the Commission or not? I am of the opinion that in the background of the positive directions of the Supreme Court in **Indra Sawahaney's case (surpa)** the State has no option but to consult the Commission. The expression "may" employed in the latter part of Section 9(2) in the context of reference by the Government must in my view be construed to be mandatory. Therefore, for this reason, the submission is required to be rejected.

The other ancillary submission made by the respondents in this context is that, the impugned G.O. is preceded by a Study Report of the Ex-Officio Commissioner, Minorities Welfare, which report in turn relied upon certain material collected by the Andhra Pradesh Minorities Commission, a statutory body created under the Andhra Pradesh Minorities Commission Act, 1998 and therefore there is substantial compliance with the directions given by the Supreme Court in **Indra Sawahaney's case (supra 7)** as a permanent independent body made an in-depth study into the socio-economic conditions of the Muslim community. The counter of the State of Andhra Pradesh in this regard is as follows :

> "6. It is submitted that in the year 1998 A.P.Minorities Commission Act, 1998 was enacted by the A.P. State Legislature. As per the provisions of the said Act the Commission was constituted for discharging the power and functions conferred under the said enactment. It is submitted that the powers of the Commission includes to conduct study and survey in respect of social conditions of the Muslim minorities and to make such recommendation for their improvement. The said Commission has conducted the study of socio economic and educational conditions of the minorities in various districts in the State of Andhra Pradesh where the Muslim minorities are predominant. The said Commission submitted a report to the Government…."

A four volume report said to have been prepared by a Research Scholar of Osmania University is

placed before the Court. The report is dated ….1989. The report shows that the study was sponsored by the Andhra Pradesh Minorities Commission. It is not a study made by the Commission independently. Assuming for the sake of argument that it is permissible for the Commission to engage any agency of its choice for collecting data, the recommendations if any are required to be made by the Commission, but can't be left to the agency sponsored by the Commission. The counter is silent about nature of the recommendations made by the Minority Commission on the basis of the abovementioned study. The only thing that can be seen from the above extracted portion of the counter is a vague statement that "the said Commission submitted a report to the Government." Nothing is spelt out as to what are the contents of the report and whether the Commission recommended for the creation of reservations such as the one created under the impugned order.

Apart from that, the report of the Minorities Commission itself is never placed before the Court. In the absence of the report of the Minorities Commission before the Court, in my view, it would be purely an academic exercise to examine the scope of the authority of the Minorities Commission. Such an exercise by a long settled authority and tradition is not undertaken.[94] Therefore, this submission is also required to be rejected.

Another submission is made by the State that the requirement to consult the Commission arises only when there is a general revision of the list, but not in the case of a proposal to include a new group of backward class of citizens to the existing list. This argument is required to be rejected for more than one reason. The expression "revision" according to the New Oxford Dictionary means reconsider and alter, re-examine and make alterations to. It has its root in the ***latin*** expression ***"revisery"*** meaning "look at again". It therefore need not necessarily mean in the context of Section 11 that a revision is an exercise that is required to be undertaken with reference to all the entries in the existing list. Even an examination of the part of the list with reference to some existing classes is also a revision and so would be an addition of one or two new classes of the existing list. In fact, the last clause of Section 11(1) makes the same abundantly clear. To give any other meaning to the expression "revision" such as the one as suggested by the State would, in my view, simply defeat the purpose of the mandate of consultation embedded in Section 11(2). The State in order to avoid the consultation with the Commission may never undertake the revision of the entire list at one time and resort to a piecemeal examination from time to time. Such a construction which would defeat the logical purpose behind the mandate and therefore is required to be avoided. Apart from that it was positively directed by the Supreme Court at para (847), which is already extracted earlier, that whenever the State proposes to include a new group/class, the matter must be referred to Backward Classes Commission in the first instance and action taken on the basis of its recommendation. Therefore, this submission is liable to be rejected.

I do not propose to examine the other questions raised in these writ petitions which are elaborately dealt with by my learned Brother Justice **B.SUDERSHAN REDDY.** I agree with him on each of the conclusions reached by him.

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knk 21.09.2004

Common Order : (by Sri GHULAM MOHAMMED, J for himself.)

* * *

I have the advantage of carefully reading judgments of Sri Justice B. Sudershan Reddy and Sri J. Chelameswar, J and the erudite expositions on various aspects of the issues involved in this batch of writ petitions. Keeping in view the importance of the issues involved, I have ventured to add my views on the issues discussed in this judgment. However, I am in complete agreement with most of the findings and conclusions of His Lordship Sri Justice B. Sudershan Reddy except adding the reasons in support of views expressed by me.

W.P. Nos. 12239, 12552, 12653, 12744, 13059, 13133 of 2004 have been filed challenging the validity or otherwise of G.O.Ms.NO.33, Backward Classes Welfare (C.2) Department, dated 12-7-2004, issued by the State of Andhra Pradesh, to the effect that the Muslim community in the State be provided 5% reservation in educational institutions and employment in the State, over and above the reservations presently provided to the Backward Classes and the Muslim community be treated as Backward Class under Category-E, in addition to the existing categories. In W.P.No.12744 of 2004 a further direction was also sought to the respondents to fill-up 5% of the seats in MBBS/BDS Course for the academic year 2004-05, with Open Category candidates.

Writ Petition No.13073 of 2004 has been filed by a Member of Parliament seeking writ of Mandamus to declare Section 11(2) of the Andhra Pradesh Commission for Backward Classes Act, 1993, (hereinafter referred to as the "A.P. Act 20 of 1993"), as illegal, unjust, arbitrary, amounting to colourable exercise of power, thereby violative of Articles 14, 15, 16 and 162 of the Constitution of India and seeking consequential directions to the respondents to proceed with reservation in favour of the Muslim community as provided in the G.O.Ms.No.33 dated 12-7-2004 without having to wait for the consultation process as provided under Section 11(2) of the A.P. Act 20 of 1993.

The Division Bench of this Court while considering the WPMPs filed in W.P.Nos.12239, 12552, 12653 and 12744 of 2004, seeking suspension of the operation of the impugned G.O.Ms.No.33, allowed the WPMPs and suspended the operation of the impugned GO holding that prima facie, the impugned G.O.Ms.No.33 violates the directions of the Supreme Court in INDRA SAWHNEY v. UNION OF INDIA [95] and offends the mandatory provisions of Act No.20 of 1993, and directed that the counseling for the seats covered by the G.O.Ms.No.33 be kept in abeyance and those seats be kept apart to be dealt with as per the ultimate decision to be rendered in the writ petitions.

The Division Bench opined that the questions raised in the writ petitions are of considerable importance having wider ramifications; two decisions have been rendered by the two different Full Benches of this Court in V. NARAYANA RAO v. STATE OF A.P. [96] and A.P. STATE B.C.W. Assn., v. STATE OF A.P.B.C.W. Dept. [97] and that in A.P. STATE B.C.W. Association's case (3 supra), separate views have been rendered, and that the matter would require further consideration in the light of the respective stand of the parties and therefore the present writ petitions deserve to be dealt with by a Full Bench. The matter was accordingly directed to be placed before the Chief Justice for constitution of appropriate Bench, and posted the matter for hearing on 27.7.2004.

On 27.7.2004, the matter was posted before us and having regard to the importance of the matter, we requested Sri Challa Seetharamaiah, learned Senior Counsel to assist the Court as "Amicus Curiae".

Heard learned counsel for all the parties at length. Written submissions have also been filed by the some of the parties and interveners and the same are taken on record and perused by me.

The contentions advanced by the learned counsel for the writ petitioners can be summarized thus :

Learned counsel for the writ petitioners contended that the impugned G.O. was issued by-passing the statutory body under the A.P. Act 20 of 1993 and failed to take note that the State has already provided reservation for the Backward classes in the Muslim Community namely “Mether” and “Doodekula” under Scheduled Castes and Backward Classes, respectively. Further, as per the judgment of the Supreme Court in INDRA SAWHANEY case (1 supra), the Commission for Backward Classes has to make recommendations in the matter relating to inclusion or exclusion in the list of Backward Classes, apart from periodical revision after appropriate enquiry. Placing reliance on the provisions of Sections 9 and 11 of the A.P. Act 20 of 1993, the learned counsel for the petitioners would submit that before passing any order for inclusion or exclusion of a backward community, the State Government has to consult the A.P. Commission for Backward Classes, and in the instant case, the impugned G.O. was issued by the Government without consultation with the Commission for Backward Classes, as required under Section 11(2) of the A.P. Act 20 of 1993. Further, the Supreme Court in INDRA SAWHNEY case (1 supra), held that before exercising the power by the State under Articles 15(4) and 16(4), the State Government must consult a permanent expert body created for identification and making appropriate recommendation for providing reservation to the other Backward Classes. That providing reservation to the Muslim community treating them as backward class amounts to providing reservation on the basis of religion and same is impermissible.

It was further contended that classification of the Muslim Community as Backward Class was invalid on the ground of non-exclusion of the creamy layer and that the counter-affidavit of the State is silent on this vital aspect of the matter. That inclusion of classes or groups in the list of Backward Classes can neither be done mechanically nor can it be done for extraneous reasons and that if forward classes are mechanically included in the list of backward classes or if the Creamy layer among the Backward Classes is not excluded, the benefit of reservation will not reach the very backward among the backward classes and such benefit would be knocked away by the Forward Classes i.e. creamy layer, thereby the reservation benefits not reaching the truly backward forever. In support of this contention, the learned counsel relied upon the judgment of the Supreme Court in INDRA SAWHNEY v. UNION OF INDIA [98]. It was also brought to our notice that unlike in Kerala, there is not even a report of any Committee identifying creamy layer among the backward classes in the State of Andhra Pradesh. Learned counsel also contended that the reservation under Articles 15(4) and 16(4) prior to the impugned G.O., was 46% and with reservation of additional 5% being provided under the impugned G.O. under Articles 15(4) and 16(4), the reservation would increase to 51%. In addition thereto 3% reservation is being provided in favour of the physically handicapped, half-percent reservation is provided under Sports and Games category and one-fourth percent for NCC category, under Articles 15(1) and 16(1), thus the total reservation comes to 55.75%. It is further contended that though the Supreme Court in INDRA SAWHNEY case considered the reservations under Article 16(1) to be horizontal cutting across vertical reservation under Article 16(4), in fact the aforesaid reservations for physically handicapped, N.C.C., and sports quota, are also vertical and is in addition to the reservation provided for SEBCs., under Article 15(4) and 16(4). That only 33 1/3% reservation for women is horizontal, and even there, 1/3rd of the seats remaining under O.C. category, is reserved for Women, which is approximately 15%, thus taking the total reservation under Articles 15(1) and 16(4) to nearly 70%. Since no reasons have been given by the State for transgressing 50% limit under Articles 15(4) and 16(4), learned counsel contended that such transgression is illegal and therefore the

impugned G.O. has to be set aside. Learned Counsel appearing for the writ petitioners further contended that the impugned G.O. is said to be based on a study of the socio-economic and educational conditions of Muslim community in the State conducted by the Commissionerate of Minorities Welfare along with some previous material and the study made by the A.P. State Minorities Commission, and that the present Report published by the Commissionerate of Minorities has not only not been able to prove social backwardness amongst Muslims, moreover it has not made any reference to the findings of the earlier Commissions viz., Anantharaman Commission, Muralidhar Rao Commission. Relying on Section 11(1) of the A.P. Act 20 of 1993, learned counsel further contended that for every ten years they have to revise the list and that without consulting the Commission for Backward Classes, and basing on irrelevant material, the Government issued the impugned G.O., and the same is not proper and therefore, submits that consultation with the Commission for Backward Classes is mandatory. It is further contended by the learned counsel that these Commissions have not recommended the inclusion of Muslim Community as a class into the list of Backward Classes on the ground that Muslim Community in toto is not socially backward. The present report/study has also failed to bring to light the material to refute the earlier findings declaring Muslim Community as a class not being socially backward. These Commissions have independently identified the parameters/criteria to be applied while determining the social backwardness of a class. The criteria applied by the Commissions are not based on the respective class being similarly situated to a Scheduled Caste or Scheduled Tribe. Neither the Government nor the Commissionerate of Minorities has utilised the relevant material, therefore the identification process and the exercise of the determination of the backward class resulting in issuance of the impugned G.O. is not based on objective criteria and the same is perverse and defective. It is further contended that the State has not followed the test of identification under Articles 15(4) and 16(4) and in the absence of sufficient material, the action of the State in including the entire Muslim community in the Backward Classes list is not proper. Thus, learned counsel appearing for the writ petitioners contended that any addition of another section of people as “backward classes” would tantamount to revision of list by the Government and the same ought to have been preceded by a mandatory consultative process with the Commission for Backward Classes constituted under the A.P. Act 20 of 1993.

Sri S. Ramachander Rao, learned senior counsel appearing on behalf of the counsel for the petitioner in Writ Petition No.13073 of 2004, by placing voluminous material before us, contended that the provision of the A.P. Act 20 of 1993 particularly, Section 11(2), which makes consultation mandatory must be read down so as to make it directory, or be declared as illegal. He further contended that the G.O.Ms.No.33 providing reservations in favour of the Muslim Community needs no interference by this court.

On the other hand, learned Advocate General contended that the provisions contained in A.P. Act 20 of 1993 are not at all mandatory as the State Government is having power to form its opinion basing on the material before it to provide reservations under Articles 15(4) and 16(4) of the Constitution of India and that since the Backward Class Commission headed by Sri Justice Puttu Swamy did not submit any report whatsoever even though more than 7½ years have lapsed, and in view of the urgency in the matter as the Muslim community is looking forward for the inclusion of their community in the list of Backward Classes, the Government issued the impugned GO., after calling for a report from the Commissionerate of Minorities Welfare. The learned Advocate General further submitted that the State is competent to issue the G.O., without consulting the Commission constituted under A.P. Act 20 of 1993, in exercise of the powers under Article 162 of the Constitution of India, and that the Government was having sufficient material. He has drawn our attention to Rule 8 of the Andhra Pradesh Commission for Backward Classes Rules, 1993, and contended that the Government has absolute right to accept or reject the report in full or

a portion thereof submitted by the Commission and that the decision of the Government on any issue shall be final.

Learned Advocate General would further contend that the A.P. Act 20 of 1993 does not provide for reference / consultation with the Backward Classes Commission appointed under the said Act in case of fresh inclusion of any class of citizens in the list of Backward Classes, and it is for the Government to take appropriate decision and therefore consultation with the B.C. Commission is not mandatory and further, the Commission is only an advisory body and non-consultation thereof does not vitiate the entire proceedings since it is a long demand pending with the Government.

Learned Advocate General also submitted that the Legislature has enacted the A. P. Act 20 of 1993, keeping in view the observations made by the Apex Court in INDRA SAWHNEY case, but retained the powers with the State Government traceable to Articles 15(4) and 16(4) of the Constitution of India and that when the State has power under Articles 15(4) and 16(4), it is absolute in nature, and the body created under the said Articles read with Article 340 cannot take away the powers of the State Government; and the fact that previous Commissions i.e. Anantaraman Commission and Muralidhar Rao Commission rejected the case of Muslims does not bar the State Government to consider the issue afresh keeping in view the social, economical and educational backwardness as of now and basing on the material available to justify the said inclusion, and it is always open to the Government to fulfil its constitutional obligation. The present reservation is 46% and by providing 5% reservations in favour of the Muslim Community, the reservation comes to 51%, which is excess only by 1%. Learned Advocate General further submitted that whatever procedure that is made applicable for categories under Backward Classes viz., A, B, C, D would automatically be made applicable to category E, i.e., Muslim Community, which is now included in the list of Backward Classes.

Heard Sri Kannabiran, Sri Rajeev Dhavan, Sri S. S. Prasad, and Sri Gangaiah Naidu, learned Senior counsel, Sri M.A. Bari, Sri C.V. Nagarjuna Reddy, Sri S. Niranjan Reddy, Sri B. Vijaysen Reddy, Sri. K.Balagopal, Sri Naushad Ali, Sri Ghulam Yazdani, Sri S.M. Subhan, learned counsel appearing for the interveners.

Learned counsel for the interveners contended that when consultation with the Commission under Section 11(2) of the A.P. Act 20 of 1993 is only for periodic revision of list by the Government, this requirement of consultation cannot be extended, when the State in exercise of its power conferred under Articles 15(4) and 16(4) takes steps for identification of backward classes and for making special provisions to them and for this exercise, the State can devise its own ways and methods and therefore Constitution of a Commission or taking its concurrence is not a pre-condition and that Muslims are entitled for reservations under Articles 15(1) and 16(1) of the Constitution also. That apart, it was also contended that the State Government has entrusted the job to the Commissionerate of Minorities Welfare headed by Ex-Officio Commissioner and this can be treated as “Commission” as contemplated under Section 11(2) of the A.P. Act 20 of 1993, and thus, the requirement of this provision has been complied with.

Sri Rajeev Dhavan, learned senior counsel appearing on behalf of the interveners, however, further submitted that both the Mandal judgment and the Constituent Assembly debates, proceeded on the basis that Muslims and other minorities can be “backward classes” entitled to consideration as ‘backward classes’. Learned senior counsel further contended that doctrine of equality is the basic feature of the Constitution of India and affirmative action of the Government with equalisation to the society is required and therefore the impugned G.O. was issued. The Executive is empowered to take an affirmative action based on the recommendations and the relevant material and thus the G.O. was issued and that Section 11(2) of the Act 20/93 merely postulates consultation with the Commission and therefore, he contends, the consultative procedure is directory in nature.

He further submitted that since the total percentage of reservation after including 5% towards Muslims is 51%, and thus, the excess is 1% only. Therefore considering the above circumstances, the relief can be moulded according to the judgment of the Supreme Court in INDRA SAWHNEY case.

Sri S. Ramachander Rao**,** learned Senior Counsel also contended that no malafides were attributed with regard to issuance of the impugned G.O., and that the Government having perused the material formed an opinion to provide reservations in favour of Muslim Community. He further submitted that there is no strict standard with regard to formation of the opinion. He further contended that the B.C. Commission did not submit even interim report to the Government, and the Government having felt it just and expedient to meet the requirement, with a view to ameliorate the conditions and to meet the requirement of long pending demand which remained unattended, having regard to the material gathered from various sources and the report submitted by the Commissionerate of Minorities Welfare, passed the impugned G.O.Ms.No.33.

Based on the contentions advanced by the parties**,** the issues that fall for consideration are as follows:

i) Whether consultation with the Commission for Backward Classes under the provisions of the A.P. Act 20 of 1992 by the Government before issuing the impugned G.O. is mandatory or only directory ?

ii) Whether on a true construction of the provisions of the A.P. Act 20 of 1993, is there any impediment to recognize the Muslim Community as backward, and can they be treated as a class within the meaning of Article 15(4) read with Article 16(4) of the Constitution, entitling them to the affirmative action?

iii) The next issue that falls for consideration is as to whether the impugned G.O. is supported by sufficient material so as to fulfil the subjective satisfaction of the State or not ?

iv) Whether by virtue of issuance of present G.O. percentage of reservations is exceeding 50%, or not and the consequences thereof? And

v) Whether the criteria with regard to identification of creamy layer has been followed or not? "

Before adverting to the above issues, it is apt to trace the brief facts, the origin and the background of reservations in education and employment.

In the year 1953 Kalekar Commission was constituted by the Government of India to determine the criteria to be adopted for treating any section of the people, other than Scheduled Castes and Scheduled Tribes, as socially and economically Backward Classes. The Commission's, report, however, was not approved by the Government of India. Again, in the year 1979 Mandal Commission was constituted. Meanwhile, the State of Andhra Pradesh issued G.O.Ms.No.1886, dated 21-6-1963 specifying certain castes as socially and educationally backward, for the purpose of selecting the candidates in Medical colleges, and reserving 25% of the seats for them. The validity of this G.O.Ms.No.1886 was challenged in a writ petition and learned single Judge of this court quashed the said G.O. Thereafter, in the year 1966 the Government has prepared another list specifying 112 communities as Backward Classes vide G.O.Ms.No.1880 dated 29.7.1966, which was called in question before the Division Bench of this Court. The Division Bench in R.SAGAR v. STATE OF A.P.[99] has struck down the same, holding that the list drawn up by the Director of Social Welfare and the Law Secretary, who, cannot be considered to be experts, and that no investigation was made nor collected any material data for classifying the persons as Backward Classes. On appeal, the said decision was upheld by the Apex Court.

In the year 1968 Manohar Pershad Committeee was appointed by the Government of Andhra Pradesh. Later, by G.O.Ms.No.870 dated 12-4-1968 the State Government appointed "Anatha Raman Commission" to prepare a list of Backward Classes in the State as socially and educationally backward Classes and the commission submitted its report to the Government. Considering the report of the Commission, the Government accepted the criteria adopted by the Commission and issued G.O.Ms.No.1793 dated 23-9-1970 making 25% reservation for Backward Classes as against recommendation of 30% by the Commission. This G.O. was also challenged before this Court and this Court struck down the G.O. On appeal, the Apex Court reversed the view of the High Court holding that the G.O. is valid being within the postulates of Article 15(4) of the Constitution of India vide STATE OF ANDHRA PRADESH v. BALARAM [100].

Again in the year 1982, "N.K. Muralidhar Rao Commission" was appointed to determine the nature of social and educational backwardness of different sections of citizens and to submit its report. The Commission submitted its report, and that with minor variations the said report was accepted by the Government by issuing G.O.Ms.Nos.166, 167, and 168 dated 15-7-1986 and the same were challenged in a batch of writ petitions in V. NARAYANA RAO v. STATE OF A.P (supra) and the said G.Os., were struck down partially pointing out certain deficiencies and infirmities.

Meanwhile, pursuant to the directions of the Supreme Court in INDRA SAWHNEY case (1 supra), the Government of Andhra Pradesh passed A.P. Act 20 of 1993. In exercise of the powers conferred on the Government under Section 3 of the A.P. Act 20/93, the Commission for Backward Classes was constituted with retired Judge of High Court of Karnataka as its Chairperson vide G.O.Ms.No.9 dated 26-1-1994.

After enactment of Act 20 of 1993, the State Government issued G.O.Ms.No.30 dated 25-8-1994, declaring status of

14 castes/communities as Backward Classes, which includes Muslims also and that no reservation was provided to them. The same was also challenged by filing writ petitions in A.P. STATE B.C.W. Assn. Case (supra). The Full Bench of this Court, *inter alia*, considering the statement made by the learned Advocate General that G.O.Ms.No.30 will be subject to the report of the B.C. Commission since the report was pending, held that decision of the State Government be treated as an opinion of the State Government and the Backward Class Commission must consider the same and make its recommendations to the Government. Curiously, no orders were passed by the Backward Classes Commission. Now, the Government by the impugned G.O.Ms.No.33 Backward Classes Welfare (C2) Department dated 12-7-2004, provided 5% reservation to the Muslim Community by treating entire Muslim Community as Backward Class, under Category–E in addition to the existing categories of A, B, C, D, in educational institutions and employment, in the state of A.P., pursuant to the report of the Commissionerate of Minorities Welfare, headed by the Ex-Officio Commissioner.

The issue that falls for consideration in the first instance is as to whether consultation with the Backward Class Commission under the provisions of the A.P. Act 20 of 93 is mandatory or directory in nature.

Be it noted here itself that the A.P. Act 20 of 1993 was enacted pursuant to the judgment of the Supreme Court in INDRA SAWHNEY case (supra).

It is also apt to state herein that after enactment of A.P. Act 20 of 1993, on earlier occasion the State Government issued G.O.Ms.No.30 dated 25-8-1994, intending to include 14 castes, including the Muslim community also, in the list of Backward Classes. The said G.O., was also challenged by filing writ petitions before the Full Bench of this Court. The majority view of the Full Bench sustained the G.O., and further

held as follows:

> " Declaration of the disputed communities by the Government as other Backward Classes is proper or not has to be decided by the Commission along with the requisition sent by the Government to consider the matters referred to the Commission. In the instant case the entire matter is before the Commission. It is open to the Commission to arrive at its own decision after conducting enquiry and send a report to the Government either upholding the inclusion or disfavouring the inclusion. Thereafter, the Government has to exercise its power as provided under the A.P. Act 20/93 and then the decision of the Government will be final for providing reservation as per Articles 15 and 16 of the Constitution. Until that exercise is completed, there cannot be and there is no immediate action giving reservations to the enlisted Backward Classes. As the matter is pending before the Commission, the High Court declined to express anything regarding the declaration of the status of the included communities. The Government instead of taking decision after calling for the report, now declared the status and referred the matter to the Commission to give its recommendations. After the report of the Commission, the Government has to consider afresh for taking a decision according to the provisions of the A.P. Act 20/93 taking the report of the Commission into consideration. A reading of the impugned G.O., also makes it clear that no final decision is taken for providing reservation to the communities enlisted in the impugned G.O. The G.O. can at best be treated as a requisition to the Commission to send a report as regards the reservation to the communities enlisted in the G.O. Thus, the question of the G.O. identifying the Backward Classes being contrary to the provisions of the A.P. Act 20/93 would not arise. There is no dispute where the legislation has envisaged a particular procedure, matters will be dealt with certainly in accordance therewith. Therefore, it cannot be said that the Government has no jurisdiction to identify the communities as was done since a report from the Commission is pending."

The Full Bench considering the issue as to whether G.O.Ms.No.30 was violative of the A.P. Act 20 of 1993 held as follows:

> " In the light of this legislation, the point framed reflects two aspects to be considered, namely, (i) whether it is open to the State Government to identify certain communities for inclusion in the list of Backward Classes pending the report of the Commission appointed under the Act and (ii) whether consultation of the Commission is pre-mandate before identification of such communities.
>
> xxxxxxxx
>
> Here the question is, whether the identification made amounts to usurping the functions entrusted to the Commission. The Act itself, under which the Commission is appointed, is a creature of the Constitutional powers, vested under Articles 15(4) and 16(4) in the State Government and therefore the Commission is subservient to the constitutional functions of the Government. Basically the report of the Commission is recommendatory in nature and normally receives acceptance of the Government. Therefore, it is ultimately the State Government that takes a decision on the recommendations made through a report by the Commission. It is, thus, manifest that the Commission being a recommendatory body cannot control the powers of the Government in taking decision thereon. The Commission only helps the Government in arriving at a correct conclusion in the matter of identifying the communities for being included in the list of Backward Classes. The power as such vested in the Government by the Constitution for identifying the communities does not get even shaken since the Commission is constituted, and it remains intact. It is stated by the learned Advocate General that petitions are filed by private parties before the Commission challenging the inclusion of the disputed communities in other Backward Classes and the said petitions are pending. Therefore, declaration of the disputed communities by the Government as other Backward Classes is proper or not has to be decided by the Commission along with the requisition sent by the Government to consider the matter referred to the Commission.". . .

With regard to the second issue as to whether consultation of the Commission is pre-mandate before identification of such communities, the Full Bench further held as follows :

> " Turning to the second aspect of the issue, whether consultation with the Commission is pre-mandate before such an identification of the communities, it is to be noticed that it is for the Commission under Sec.9 to examine the request for under-inclusion and the over-inclusion of the communities, while Sec.11 empowers the Government to revise the list from time to time to suit the changing needs of the communities in the State. This exercise of revision by the Government is certainly only after consultation of the Commission. However, it is to be borne in mind that revision of a list pre-supposes existence of a list and further the impugned G.O. has not brought in a situation where a revision as such is effected to the existing list, but simply an identification of different communities is made for being enlisted by the Commission. It is for the Commission to enlist such communities in its report in a recommendatory form to the Government for its acceptance. The Commission may or may not accept the identification made by the Government through the impugned G.O., more so when there are petitions filed before the Commission – as was submitted – seeking non-inclusion of the said communities in the list. In this review of the matter, it cannot be said that a revision only was effected under section 11 through the impugned G.O., muchless an occasion has arisen to render the impugned G.O. vitiated for non-consultation with the Commission, a mandate declared by S.11. Accordingly, we hold that the impugned G.O. is not amenable for challenge on the ground of violation of the provisions of the Act 20/93."

Thus, the majority view of the Full Bench, though held that Section 11 empowers the Government to revise the list from time to time to suit the changing needs of the communities in the State, this exercise of

revision by the Government is certainly only after consultation with the Commission and that since G.O.Ms.No.30 has not brought in a situation where a revision as such is effected to the existing list, but simply an identification of different communities for being enlisted by the Commission and it is for the Commission to enlist such communities in its report in a recommendatory form to the Government for its acceptance, therefore, G.O.Ms.No.30 is not amenable for challenge on the ground of violation of provisions of A.P. Act 20 of 1993.

Another learned Judge of the Full Bench, Sri Justice B. Subhashan Reddy, J, while sustaining the G.O. on a slight different reasoning, categorically held that the word "shall" employed under Section 11(2) of the Act 20/93 is mandatory and not directory. The relevant portion reads as follows :

> " The word "shall" employed under Section 11(2) of the Act, is mandatory and not directory. Merely because the Government feels hurry due to some agitation, it cannot bypass a mandatory provision treating the same as directory which will make the entire A.P. Act 20/93 nugatory and otiose and the very purpose of constituting a Commission is defeated. The responsible Government may have to respond to the agitation for taking up the cause for redressal of the grievances, but the same has to be done as per the procedure established by law and in the instant case, A.P. Act 20/93. As the process of identification of Backward Classes is covered by the legislative field, i.e. A.P. Act 20/93, the Government is bound to follow the provisions contained therein scrupulously."

Before the Full Bench, a statement was made by the learned Advocate General that the G.O.Ms.No.30 will be subject to the report of the B.C. Commission, and in those circumstances, while sustaining the G.O., the above orders were passed.

Obviously, in order to decide as to whether particular provision is mandatory or directory, the broad purpose of enactment of the Statute, and the object of the particular provision must be considered. A.P. Act 20 of 1993 is the outcome of the judgment of the Supreme Court in INDRA SAWHNEY (1 supra) and the same came into force with effect from 03-12-1993 and A.P. Act 20 of 93 was enacted with all provisions and the powers are in-built. A perusal of the "*Statement Of Objects and Reasons*" of the Act makes it very clear and the same is extracted hereunder:

> " Supreme Court in its judgment delivered on 16.11.1992 on the question of reservation in appointment in Central Services/Posts for Backward Classes directed the Central and State Governments to set up permanent Backward Classes Commission for examining, considering, recommending the requests for inclusion and complaints of 'under inclusion' and 'over inclusion' in the list of Backward Classes and to determine the economic criteria to exclude from the list of Backward Classes where such lists are already under operation.
>
> It has been decided to undertake a suitable legislation for constituting a Commission as per direction of Supreme Court to examine, consider and recommend the requests for inclusion and complaints of 'under inclusion' and 'over inclusion' in the list of Backward Classes and to examine any other matter relating to B.Cs., that may be referred to it by the State Government from time to time.
>
> This Bill seeks to give effect to the above decision. "

After coming into force of the A.P. Act 20 of 1993, the Commission for Backward Classes was constituted on 26-1-1994. Chapter-I deals with title and definitions. Under Section 2(d), "lists" means lists prepared by the Government from time to time for the purposes of making provision for the reservation of appointments of posts in favour of the backward classes of citizens which, in the opinion of the Government, are not adequately represented in the services under the Government and in any local authority or other authority in the State. Section 3 in Chapter II of the A.P. Act 20 of 1993 deals with Constitution of the Commission, Section 4 deals with term of office and conditions of service of the Chairperson and other members, Section 5 pertains to officers and other employees of the Commission. Section 6 deals with regard to salaries and allowances to be paid out of grants. Pertinently, Section 7 of the Act says that 'no act or proceeding of the Commission shall be invalid on the ground merely to the existence of any vacancy or defect in the constitution of the Commission'. Section 8 deals with regard to

procedure to be regulated by the Commission.

In Chapter III of the A. P. Act 20 of 1993, Functions and Powers of the Commission are envisaged in it, and it comprises

Sections 9, 10, and 11. It is relevant to extract Section 9 of the Act hereunder:

> " 9. Functions of the Commission : --
>
> (1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such list and tender such advice to the Government as it deems appropriate.
>
> (2) The Commission shall examine and make recommendations on any other matter relating to the backward classes that may be referred to it by the Government from time to time
>
> (3) It shall be competent for the Commission at the request of the Government to make an interim report in regard to any Castes or Classes in whose cases urgent action under the Act is, in the opinion of the Government necessary. Any action taken by the Government on the basis of such report shall be subject to review with prospective effect as and when the final report of the Commission is received.
>
> (4) The Commission shall enquire into specific complaints with respect to then on-observance of the rule of reservation in the admissions into educational institutions and also reservation of appointments to posts/services under the Government and other local authority or other authority in the State, as applicable to the listed Backward Classes and furnish its report to the Government"

From bare reading of the above provisions, which is in plain language and in unambiguous terms, it is clear that it is incumbent upon the Commission for Backward Classes to examine the requests for inclusion of any class of citizens as Backward Class in the lists and hear complaints of over-inclusion and under-inclusion of any backward class in such list and give such advice to the Government as it deems appropriate. The Commission has also to examine and make recommendations on any other matter relating to backward classes that may be referred to it by the Government from time to time. Section 9(3) says that it shall be competent for the Commission at the request of the Government to make an interim report, in regard to any castes/classes in whose cases urgent action under the Act in the opinion of the Government is necessary. It further makes clear that any action taken by the Government on the basis of such report shall be subject to review with prospective effect as and when the final report of the Commission is received. Section 9(4) pertains to examining any complaint with respect to non-observance of rule of reservation.

Section 10 of the Act deals with powers of the Commission, which ordains that the Commission while performing its functions under Section 9(1) shall have all the powers of a civil court trying a suit and particularly in respect of : (a) summoning and enforcing the attendance of any person from any part of State and examining him on oath, (b) requiring the discovery and production of any document, (c) receiving evidence on affidavits; (d) requisitioning any public record or copy thereof from any Court or office; (e) issuing commissions for the examination of witnesses and documents; and (f) any other matter which may be prescribed.

The power under Section 9 of the A.P. Act 20 of 1993 is in respect of the existing list after revision or prior to the revision. Pertinently, Section 11 of the A.P. Act 20 of 1993, is in respect of revision of the lists. It is, therefore, apt to extract the section 11 hereunder:

> " 11. Periodic revision of list by the Government :-
>
> (1) The Government <u>may</u> at any time, and shall, at the expiration of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with a view to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.
>
> (2) <u>The Government shall while undertaking any revision referred to in sub-section (1) consult the commission</u>." (emphasis is mine)

A reading of the above provision, which is in plain and unambiguous language, leaves no room for interpretation at all. The provision categorically says that <u>the Government shall while undertaking any</u>

revision referred to sub section (1), consult the Commission. A. P. Act 20 of 1993 is comprehensive in nature and it empowers the authority concerned to make a thorough and detailed enquiry as to which class of citizens can be really construed and identified as Backward Class and that the same has been enacted with laudable object of identifying the real Backward Classes so as to make reservations to them. The issue of reservation traces its origin to the Constitution of India, which guarantees to the citizens social justice and equality and in this regard, the affirmative action of the State has been initiated time and again to bring the backward classes on par with others who are educationally and socially in an advantageous position. In this background, there is always a presumption that Legislature does not indulge in pointless legislation and the courts have to adopt a purposeful and harmonious construction, in order to make the provisions and subsequent actions meaningful in the context. Therefore, the contention that if it is construed as mandatory, it would impinge upon the power of the State, and would be inconsistent with Section 9(1) of the A.P. Act 20 of 1993, is baseless. By enactment of A.P. Act 20 of 1993 and by Constitution of Commission for Backward Classes, procedure for identifying the Backward Classes was sought to be regulated, to enable the State Government to correctly and accurately identify the socially backward classes, and it does not amount to delegating of its powers to the Commission for Backward Classes. Obviously, after the report of the Commission for Backward Classes also, it is the State Government which has to consider the same and pass appropriate orders. Further, the statutory provision contained under Section 11(2) of the A.P. Act 20 of 1993 with regard to consultation with the Commission before the Government takes a decision either to exclude the existing backward classes, or to include the new Backward Classes, is in tune with the judgment of the Supreme Court in INDRA SAWHNEY (supra) wherein it was categorically held that there ought to be a permanent body, in the nature of Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of Other Backward Classes can be made and such body must be empowered to examine the complaints of the said nature and pass appropriate orders. The Apex Court further held as under:

> " Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefor. Even if any new group/class is proposed to be included among other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of the recommendation."

True, that such orders passed by the Commission/Tribunal, would not be binding on the Government and ultimately the decision of the Government is final. But the question is, after the enactment of the A.P. Act 20 of 1993, if any new class/group is proposed to be included among the backward classes, such matter has to be referred to the Commission constituted for that purpose in the first instance and action be taken on the basis of its recommendations. It is pertinent to extract hereunder the relevant portion of the judgment of the Apex Court in INDRA SAWHNEY case:

> " We are of the considered view that there ought to be a permanent body, in the nature of a Commission or tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and Sections in the lists of Other Backward Classes can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefor. Even if any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective inquiry. It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body can be created under clause (4) of Article 16 itself - or under Article 16(4) read with Article 340 - as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at central level and at the level of the States within four months from today. They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature aforementioned, if any, received. It should be open to the government of India and the respective State governments to devise the procedure to be followed by such body. The body or bodies so created can also be consulted in the matter of periodic revision of lists of OBCs. As suggested by Chandrachud, CJ in Vasanth Kumar there should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be."

A plain reading of the above observations would lead to an irresistible conclusion that that if any new class/group is proposed to be included, consultation with the B.C. Commission is mandatory. Even if for argument sake, it is accepted that consultation with the B.C. Commission is not mandatory, then the purpose of enactment of the Act 20/93 would be nullified thereby making the whole Act itself as redundant, which would run contrary to the directions of the Supreme Court.

The next point that falls for consideration is as to whether on a true construction of the A.P. Act 20 of 1993, is there any impediment to the recognition of the Muslim Community as backward, and can they be treated as a "class" within the meaning of Article 15(4) read with Article 16(4) of the Constitution, entitling them to the affirmative action.

It is pertinent to mention that the issue with regard to reservation in favour of Muslims is more than decade old in the State of Andhra Pradesh. The State issued orders vide G.O.Ms.No.30 dated 25.8.1994 wherein Kapus and some other castes, and also Muslim Community, were identified as Backward Classes. Subsequently, this matter was stated to be referred to the Backward Classes Commission constituted under the Statute long back, pursuant to the judgment of the Full Bench of this Court referred above, for giving its report, but the report was not submitted by the Backward Classes Commission.

In BALAJI v. STATE OF MYSORE [101] an order of Government of Karnataka was made under Article 15(4) of the Constitution of India pursuant to the recommendations of the Nagan Gowda Committee. The Constitution Bench of the Supreme Court presided over by Sri Gajendragadkar C.J. observed that backwardness under Article 15(4) was to be both social and educational and not either social or educational. Proceeding to consider what social backwardness was, the Court observed that it would not be irrelevant to consider the caste but the importance of caste should not be exaggerated. It could not be the sole or the dominant test to determine social backwardness of groups or classes of citizens. The social backwardness resulting from poverty was likely to be aggravated by considerations of caste, it only showed the relevance of caste and poverty in determining backwardness of citizens. The Apex Court also pointed out that some occupations were treated as inferior according to conventional beliefs and therefore, persons following these occupations tended to become socially backward. Therefore, evolution of a proper criteria for determining who were socially backward was indeed a very difficult task requiring elaborate investigation and collection of data. The Supreme Court held that since Nagan Gowd Committee had considered the question solely on the basis of caste, without regard to other factors and therefore the Government Order, which was passed based on the report of the Committee had to be struck down. Considering the question of educational backwardness, the Supreme Court expressed its opinion that the State was not justified in including in the list of backward classes, castes or communities whose average of student population per thousand was slightly above or very near or just below the State average. Considering the question of educational backwardness, the Court expressed its opinion that the State was not justified in including in the list of backward classes, castes or communities whose average of student population per thousand was slightly above or very near or just below the State average and that it was only communities which were well below the State average that could properly be regarded as educationally backward.

In view of the authoritative pronouncement of the Supreme Court in INDRA SAWHNEY case (1 supra), the principle is so well settled that it is not necessary to refer to all the authorities in this judgment.

The Apex Court in INDRA SAWHNEY (1 supra) after exhaustively considering the aspect of reservations, held that

Article 16(4) is exhaustive in respect of all reservations, benefits and concessions. The relevant portion of

the judgment reads as under :

> "In our opinion, therefore, where the State finds it necessary - for the purpose of giving full effect to the provision of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under clause (4) itself. In other words, all supplemental and ancillary provisions to ensure full availment of provisions for reservation can be provided as part of concept of reservation itself. Similarly, in a given situation, the State may think that in the case of a particular backward class it is not necessary to provide reservation of appointments / posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under clause (4) itself. In this sense, clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of "the backward class of citizens". Backward Classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of clause (4) of Article 16. "

The Supreme Court in INDRA SAWHNEY case (1 supra) further held that it would not be possible to scientifically and exhaustively set out various indicators for determining "social backwardness'. It would be pertinent to refer to the following paragraphs Nos. 45 and 602 of Sri S. Ratnavel Pandian, J (as he then was) and Sri R.M. Sahai, J (as he then was), respectively, from the judgment of the Supreme Court in INDRA SAWHANY case (1 supra) which illustrates certain criteria, and here it is relevant to extract the same:

> **" 45)** To assimilate the expression 'class' in its legal sense, the said expression should be strictly construed and tested on the principles of agreed criteria which throw a flood light on its true meaning. In interpreting the words 'backward class', I am sorry to say there is no uniform and consistent view expressed by the court by laying down a rigid formula exhaustively listing out the specific criteria. The battery of tests that are recognized by the courts in determining 'socially and educationally backward classes' are caste, nature of traditional occupation or trade, poverty, place of residence, lack of education and also the sub- standard education of the candidates for the post in comparison to the average standard of candidates from general category. These factors are not exhaustive.

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> 605) The ideal and wise method, therefore, would be to mark out various occupations, which on the lower level in many cases amongst Hindus would be the caste itself. Find out their social acceptability and educational standard. Weigh them in the balance of economic conditions. Result would be backward class of citizens needing genuine protective umbrella. Group or collectivity which may thus emerge may be members of one or the other community. Advantage of occupational- based identification would be that it shall apply uniformly irrespective of race, religion and caste. Reason for accepting occupation-based identification is that prior to 1950 Sudras amongst Hindus were all those who were not twice born. Amongst them there was vertical and occupational divisions. Similar hierarchy existed amongst Muslims. Same is true of other communities. Shri Naik narrated a list of, 'intermediate backward classes' and 'depressed backward classes'. It may not be exhaustive. But it is indicative that different categories of persons are, normally, known by occupation they carry. 'Castes, therefore, are special form of classes which in tendency are present in every society. It was said by Lord Bryce long back for America that classes may not be divided, for political purposes into upper and lower and richer and poorer, "but according to their respective occupation they follow". Class according to Tawney may get formed due to various reasons, "war, the institution of private property, biological characteristic, the division of labour". And, "even today, indeed though less regularly than in the past class tends to determine occupation rather than occupational class". So is the case in our society. It is immaterial if caste has given rise to occupation or vice versa. In either case occupation can be the best starting point constitutionally permissible and legally valid for determination of backwardness"

Articles 15(4) and 16(4) of the Constitution of India enables the State to make special provisions for the benefit of backward classes as and when the State feels it necessary. Article 15(4) enables the State to make special provision for the advancement of socially and educationally backward classes of citizens, while Article 16(4) enables to make provisions for the reservation of appointments or posts in favour of backward classes of citizens. The Supreme Court in INDRA SAWHNEY case (supra) made it clear that the amplitudes of Articles 15(4) and 16(4) are different. The criteria for making provisions for reservations under Article 16(4) is wider and it is connected with empowerment.

In the State of Andhra Pradesh one consolidated list was made i.e. under Articles 15(4) and 16(4),

and no distinction was made between "socially and educationally backward classes" and "socially Backward". Whether reservations should at all be kept and if so, in which field and at what levels and in which mode of recruitment, and at what percentage, are all matters of policy.

Equality of status and opportunity, to secure social justice is the pledge. Equality can be achieved only when the inequalities are eliminated, more so by formulation of a policy by the State. One such method enjoined by the Constitution is to "bring up" the level of the backward classes to the level of the forward classes; and that the reservation in educational institutions and governmental services is being resorted to, by which the level of backwardness can be reduced to the possible extent. The reservation created by the Constitution is an enforceable right, enforceable by those who are within the parameters. The Constitution does not lay down as to who are the Backward Classes, and such Backward Classes cannot be static and they have to be identified from time to time. Reservations for such Backward Classes may also fluctuate, and once a community which is included in the list of Backward Classes reaped the benefits granted by the Government and advanced socially and educationally, it can no longer remain as Backward Class and reservations in regard to such persons may have to be revised. So also the persons, who are not included in the Backward Classes earlier, but in the course of time and due to several circumstances, may have to be construed as Backward Classes and consequently they may have to be included. In other States i.e. in Karnataka and Tamilnadu, Kerala, reservation was provided to Muslim community.

Be that as it may, the Supreme Court in INDRA SAWHNEY case (1 supra), (on behalf of the majority, rendered by Sri Jeevan Reddy, J, as he then was), observed that with regard to question of identification, one has to begin somewhere – with some group, class or section, in the absence of any set or recognized methodology. It was also held by the Supreme Court that, besides castes there may be other communities, groups, classes and denominations which may qualify as backward class of citizens, for example, in a particular state, Muslim community as a whole may be found socially backward. As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments. The concept of "caste" in this behalf is not confined to castes among Hindus, it extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice.

The Supreme Court also after reviewing the Constituent Assembly Debates concluded that the objective behind Article 16(4) is empowerment of the deprived backward communities – to give them a share in the administrative apparatus and in the government community. The Constitutional provision namely Article 16(4) has been purposely introduced for preferential treatment to the backward classes, in order to make the un-equals equal. The Apex Court further held that having exhausted the castes or simultaneously with it, the Authority may take up for consideration other occupational groups, communities and classes. It may take up the Muslim Community, (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterized as a backward class in that state or region, as the case may. The relevant portion of the judgment in INDRA SAWHANI case (1 supra) extracted hereunder.

> " Coming back to the question of identification, the fact remains that one has to begin somewhere - with some group, class or section, There is no set or recognized method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation poverty and social backwardness are so closely intertwined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of

> Kerala by their respective State governments). Similarly, certain Sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterized as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by the Justice O. Chinnappa Reddy Commission in this respect.
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> We do not mean to suggest - we may reiterate - that the procedure indicated hereinabove is the only procedure or method/approach to be adopted. Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the court has no say in the matter. The only object of the discussion in the preceding para is to emphasise that if a Commission/Authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform. In a vast country like India, it is simply not practicable. If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, Section or class, they too can be treated as backward ".

The Apex Court thus observed that the authority may take up the Muslim Community, after excluding those sections, castes and groups, if any, who have already been considered, and find out whether it can be characterized as a backward class in the State. Identifying a section of society on the basis of the religion they follow is only an identification of class of citizens. Considering the circumstances, I am of the view that such an exercise is justified and there is no impediment to hold that Muslims are entitled to the affirmative action and I am fortified by the observations and the view taken by the Supreme Court in INDRA SAWHNEY case (1 supra) referred above. The issue is answered accordingly.

That apart, the Writ Petitioner in W.P.No.12239 of 2004, stated in the affidavit that the State is empowered to make reservations to socially and educationally backward classes under Article 15(4) and 16(4) of the Constitution of India, and it may consider providing reservations to any section of the socially disadvantaged people, including Muslim community, by appropriate revision as provided under the A.P. Act 20 of 1993 by eliminating the socially elevated sections from the existing reservations, but the writ petitioner contends that the reservation should not be in the name of religion. In the instant case, the religion was not made as criteria for recognizing the Muslim Community as Backward Class and the stand of the State Government is that the reservations are provided to the Muslim Community, in present set of circumstances, based on the relevant material and pursuant to the report of the Commissionerate of Minorities Welfare.

Therefore, the next issue that falls for consideration is as to whether the impugned G.O. is supported by sufficient material so as to fulfil the subjective satisfaction of the State or not ?.

In A.P. STATE B.C. W. ASSOCIATION' s case (supra), G.O.Ms.No.30 was issued declaring 14 classes/communities as Backward Classes, which includes Muslims also. The result is that the G.O.Ms.No.30 was passed, without consulting the Commission for Backward Classes, as required under

the provisions of the A.P. Act 20 of 1993, and therefore the Full Bench observed that it has to be treated as requisition to the Commission for Backward Classes and that the Commission for Backward Classes has to submit its report to the Government.

It is pointed out by the learned Advocate General that pursuant to the judgment of the Full Bench of this Court, no report was given by the Commission for Backward Classes during the past 7½ years, and that at present no Backward Classes Commission is existing, the Government therefore entrusted the same task to the Commissionerate of Minorities, headed by the Ex-Officio Commissioner to make an in-depth study on the socio-economic and educational conditions of Muslim community, and based on its report, the Government passed the impugned G.O.

From the material produced before us by the learned Advocate General it is seen that as the matter of providing reservations to Muslim community was pending since a long time, a meeting of various Secretaries was held by the Chief Secretary to the Government of Andhra Pradesh on 2.6.2004, and that it was resolved to entrust the issue to some Governmental organization/authority, preferably to "Commissionerate of Minorities Welfare" headed by the Ex-Officio Commissioner working under the Administrative control of Minorities Welfare Department to examine the socio-economic and educational conditions among Muslim community and to submit a report to the Government. Based on the minutes of the said meeting, G.O.Ms.No15 dated 4th June 2004 was issued by the Government entrusting the work relating to the study of the socio-economic and educational conditions of the Muslim community in the State to the Commissionerate of Minorities Welfare headed by the Ex-Officio Commissioner. It is appropriate to extract the relevant portion of the G.O. as under :

" X X X X

3) The Commissionerate of Minorities Welfare shall :

i) Examine the Social, Economical and Educational backwardness of Muslim Community in the state for the purpose of including them within the purview of the Backward Classes of citizens under Articles 15(4) and 16(4) of the Constitution of India and present its report to the Government of India.

4) The Commissionerate of Minorities Welfare may

a) Utilize the material already available on the subject, if any, with the Commissionerate or with any other commission/organization such as A.P. State Minorities Commission etc., or by studying the issue further, if necessary.

b) Obtain such information as it may consider necessary or relevant for the purpose of study work from any Governmental authority /commission/ organization or individuals as may in its opinion be any help to it in preparing the Report."

Thus, the Government entrusted the study to the Commissionerate of Minorities Welfare, headed by the Ex-officio Commissioner, who studied the socio-economic and educational development of Muslim Community in the State.

It was stated in the study report of the Commissionerate of Minorities Welfare that Socio-Economic condition of Muslim Community revealed that around 65% of Muslims are living below poverty line (i.e. annual income of Rs.11,000/- or below), and 16% are living under double-poverty limit (i.e. annual income is Rs.44,500/- or above), and that literary rate among the Muslim Community is only 18% as against 44% rate among other communities in the State as per 1991 Census. The literacy rate among Muslim women is very poor which is only 4%. It is also stated that survey was done by the District Minorities Welfare Offices and A.P. State Minorities Corporation and the methodology for assessing the socio-economic conditions of the Muslim Community in the State comprises research design, desk research, field survey and analysis etc. The study report of the Commissionerate of Minorities Welfare also reveals that the Socio-Economic conditions of Muslim Community in the State are very poor due to poverty, illiteracy and inadequate representation in various fields of the society and that most of the Muslims are engaged in petty business activity (viz., *Pan Shop, Chai Dukan*, selling fruits and flowers, labourers in Engineer Work shops, watch servicing and repairing of Radio and T.V. etc.,) in addition to rural artisans. A perusal of the study report

also reveals economic conditions, literacy and also occupational profile, and on that basis the Commission of Minorities Welfare recommended for providing 5% reservations to Muslim minorities in Employment and in Educational institutions, and basing on the said report the Government issued the impugned G.O. (The reason for taking 1991 census data is that 2001 Census Data was under finalization, and it may take some more time to make the data available as per the letter dated 23.7.2004 issued by the Director of Census Operations, and therefore the Commissioner of Minorities Welfare utilized the available 1991 census data).

In the G.O., it is stated that the Commissionerate of Minorities Welfare, headed by the Ex-Officio Commissioner has made an in-depth study on the Socio-Economic and Educational Conditions of Muslim Community in the State and submitted his report to the Government, which focused on the living conditions, occupational profile, income and literacy level and participation in social activities. Basing on the said report, the stand of the Government is that the Muslims are living in deplorable socio-economic conditions, and thereby it is necessary to include them in the Backward Classes. The previous report submitted by the Research Wing of the Osmania University in respect of the Muslim Community was also taken into consideration in this regard. Therefore, it is clear only to the extent that there was some material upon which the opinion is formed. In this context it is appropriate to extract the observations of the Supreme Court in INDRA SAWHNEY' s case (supra);

> " All that is required is, there must be some material upon which the opinion is formed. In deed in this matter the court must show due deference to the opinion of the State, which in the present context means executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether. The scope and reach of judicial scrutiny in matters within subjective satisfaction of the executive are well and extensively stated in Barium Chemicals v. Company Law Board – AIR 1967 SC 295, which need not be repeated here. Suffice it to mention that the said principles apply equally in the cases of constitutional provision like Article 16(4) which expressly places the particular fact within the subjective judgment of the State/Executive.
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> x x x
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> At the same time, we must say that court would normally extend due deference to the judgment and discretion of the Executive a co-equal wing – in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight."

Further, the contention that the Government on earlier occasion already included "Doodekula" and "Methar" communities in Backward Classes and Scheduled Castes list, respectively, also merits no consideration, since based upon the study, and depending upon the degree of backwardness of Dudekula and Methar, they were included in the Backward classes and Scheduled Castes lists respectively and that does not take away the right of the State to undertake further study with regard to other Muslims who have not got the benefit of reservation and to decide the same.

It is, however, pointed out that a criteria with regard to social backwardness which was the crucial aspect was not pertinently specified in the report. Further, the State Government has to reach a conclusion that the Backward classes for which the reservation is made are not adequately represented in the State services, by undertaking necessary exercise and based on the material available. Obviously, the State is empowered to take a decision for extending the benefits of reservation to the deserving class of citizens as applicable to the Backward Classes and the judicial review ordinarily of lesser scrutiny and needs application of lenient standard for reviewing the State affirmative action. Identification of a class of citizens as backward class of citizens is essentially the function of the State and the scope of judicial review on such identification is not akin to that of the appellate or revisional jurisdiction. Considering the circumstances, I am not inclined to go into other details as to whether rational and scientific method was adopted or not by the Commissionerate in submitting the report, for the reason that any observations made in this issue (iii), will be of no avail, and does not sustain the impugned G.O. Ms.No.33 passed by the

Government, for the reasons infra.

As stated above, pursuant to the judgment of the Apex Court, A.P. Act 20 of 1993 was enacted and in exercise of the powers conferred on the Government under Section 3 of the A.P. Act 20 of 1993, the Backward Classes Commission was constituted with retired Judge of High Court of Karnataka as its Chairperson under G.O.Ms.No.9 dated 26-1-1994, initially for a period of three years, and that the period of commission was extended from time to time up to 30.9.2002. The period of Commission for Backward Classes was however, expired on 30.9.2002. Thereafter, no extension was granted and that it ceased to be a Commission. Now, the new Government by the impugned G.O.Ms.No.33 Backward Classes Welfare (C2) Department dated 12-7-2004, provided 5% reservation to the Muslims by treating entire Muslims as Backward Class under category –E in addition to the existing categories of A, B, C, D, in educational and employment, in the state of A.P., pursuant to the report of the Commissionerate of Minorities Welfare, headed by the Ex-Officio Commissioner.

Therefore, the issue that is germane for consideration is as to whether Constitutional duty of the State can be shackled by such inaction on the part of the Backward Classes Commission, in the background of the fact that though the State has referred the matter for its opinion after identification and the Commission for Backward Classes failed to decide the matter relating to G.O.Ms.No.30 dated 25.8.1994.

Be it noted herein that in the impugned G.O. there was no mention about reference made by the Government to the Commission for Backward Classes, pursuant to the judgment of the Full Bench of this Court referred supra. Before this Court, it is now contended by the learned counsel appearing on behalf of the interveners that individual representations were also given to the Commission for Backward Classes with regard to inclusion of Muslim community in the list of the Backward Castes. Obviously, inaction on the part of the Backward Classes Commission was not challenged on the earlier occasion. That apart, if the term of the Commission for Backward Classes expired on 30.9.2002, the Government ought to have revived or reconstituted the Commission for Backward Classes and the State cannot bypass the body which is the special body constituted pursuant to the directions of the Supreme Court in INDRA SAWHNEY (1 supra), more so, the State legislature enacted the law and that the provisions of that statute got to be followed, and no other body is competent to determine the same. The Supreme Court in INDRAW SAWHNEY case (supra) evolved criteria for determination of the social and educational backwardness. That apart, Objects and reasons of A.P. Minorities Commission Act, 1998 and the enactment of A.P. Act 20 of 1993 are entirely different. Therefore, the contention that under section 12(f) of the Andhra Pradesh Minorities Commissions Act, 1998 the Minority Commission can give its recommendations with regard to inclusion of a class in Backward Class is meritless. In the circumstances, the contention that consultation with the B.C. Commission was not mandatory cannot be accepted. Obviously, the Government has the power to reconstitute the Commission for Backward Classes and it can do so at this stage also.

In the circumstances, the impugned G.O., passed by the Government is unsustainable on the grounds of **non-consultation with the Backward Classes Commission as per provisions of Section 11(2) of the A.P. Act 20 of 1993, and the dicta laid down by the Supreme Court in INDRA SAWHNEY's case (1 supra).** However, it is made clear that there is no impediment for the State Government to grant reservations to the Muslim Community, supported by sufficient material fulfilling the subjective satisfaction of the State, at this stage also, in accordance with law.

With regard to contention that by virtue of providing 5% reservation to the Muslims in the educational institution and employment, the total percentage of reservation exceeds the ceiling of 50%, the Supreme Court in INDRA SAWHNEY case held that, "while 50% shall be the rule, it is necessary not to put out of

consideration certain extraordinary situations inherent in the great diversity of this country and the people". However, the present challenge of impugned G.O. on the basis of crossing 50% ceiling cannot be gone into at this stage for the simple reason that the Supreme Court in INDRA SAWHNEY case (1 supra) envisaged eschewing of creamy layer from the existing communities of the backward classes and if that is done, the resultant situation may be get balanced.

The Government of India issued various guidelines for elimination of socially advanced persons in identification process and the said guidelines have also been approved in subsequent judgments of the Supreme Court in ASHOKA KUMAR THAKUR v. STATE OF BIHAR[8] and REGIONAL PROVIDENT FUND COMMISIONER v. SHIV KUMAR JOSHI[9].

It is apt to refer to relevant portion of the judgment of the Apex Court reported in INDRA SAWHNEY v. UNION OF INDIA (4 supra) as follows :

> " What we mean to say is that Parliament and the legislature in this country cannot transgress in the basic features of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. Whether the creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position still be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be totally illegal. Such an illegality offending the root of the constitution of India cannot be allowed to be perpetuated even by constitutional amendment. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination. What even Parliament cannot do, the Kerala Legislature cannot achieve."

In view of the above dicta laid down by the Supreme Court, it is incumbent upon the State to evolve a time bound framework with regard to identification of persons falling under creamy layer, as per the judgments of the Supreme court referred supra.

Further, as no norms or criteria was fixed and in the absence of same there is every possibility of misusing the said reservation to the advantage of well to do people in Muslim community, the matter therefore has to be dealt with manifestation for persons who are really in need of the benign assistance by the State. From the material that was produced before us, the striking things about this Community are that there exists extreme economic and cultural poverty of the vast majority of the members and the wide gap that separates the rich and poor members of the community. It is unfortunate that the above developments over a period of ten years or so, have not provided succour to the poor among the Muslim community. However, when an authority is constituted by a statute to perform certain functions, it is obligatory on its part to discharge those functions. Unfortunately, the Backward Classes Commission failed to give its recommendation to the Government and the matter relating to G.O.Ms.No.30 dated 25.8.1994 was kept pending for one reason or the other. The inaction on the part of the earlier Commission for Backward Classes for more than one decade in this regard is not proper.

Considering the facts and circumstances of the case, I am of the view that the impugned G.O.Ms.No.33 is unsustainable**,** and at the most it can be treated as reference of the Government to the Commission for Backward Classes. The State Government is therefore, directed to reconstitute the Commission for Backward Classes, and on such reconstitution of the Commission for Backward Classes, the Government shall initiate the process of consultation and forward the necessary material, including the G.O.Ms.NO.33, to the Commission for Backward Classes.

On receipt of the same the Commission for Backward Classes, shall examine the same, and submit a report to the Government within a period of four months, for taking appropriate action in this regard by the Government, and the Government has to pass appropriate orders within a period of three months thereafter, considering the dicta laid down by the Supreme Court in INDRA SAWHNEY (1 supra).

Subject to above directions, the writ petitions 12239, 12552, 12653, 12744, 13059, 13113 of 2004 are disposed of. In view of the orders passed in the above writ petition, no further orders are needed to be passed in W.P. No.13073 of 2004. The writ petition is accordingly disposed of.

No Costs.

GHULAM MOHAMMED, J

Date : 21-9-2004.

Kk/

One Fair Copy to THE HONOURABLE SRI JUSTICE B. SUDERSHAN REDDY

(For his Lordships Kind I

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(For his Lordships Kind I

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(For his Lordships Kind I

ASSISTANT REGISTRAR

// TRUE COPY //

SECTION OFFICER

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Secretariat, Hyderabad-500 004.

2) The Principal Secretary to Government,
The Government of Andhra Pradesh,
Medical and Health Department,
A.P. Secretariat, Hyderabad.

3) The Principal Secretary,
The Government of Andhra Pradesh,
General Administration Department,
Secretariat Buildings, Secretariat, Hyd.

4) The Secretary, United Muslim Forum, Madina Mansion,
Narayanguda, Hyderabad,

5) The Secretary, All India Sufi Conference
Lakdikapul, Hyderabad.

6) The Secretary, United Minority Front
Basheerbagh, Hyderabad.

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[1] 1992 Supp (3) SCC 217

[2] Glanter, Marc, Competing Equalities, 1983

[3] AIR 1976 SC 490 at p.513 (Mathew, J.)

[4] That was the Aristotalian concept of justice. Aristotle said that among unequals treatment should be unequal. See also, Stone, Julius, 'Justice is not Equality' in, Kamenka, Eugene and Tay, Alice Erh-Soon (ed.) Justice Ideals and Ideologies, (Edward Arnold), 1979, pp.97-115.

[5] Ronald M. Dworkin, "Why Bakke Has No Case", *New York Review of Books, 24, No.18 (Nov., 1977), p.12.*

[6] Ashok Mitra; Equality of Results is the Crucial Test; The Telegraph; Calcutta; 23 July, 1986.

[7] Lohia R.M.; *Marx, Gandhi and Socialism;* op. cit; p.35

[8] Rawls, John; *A Theory of Justice; Harvard U. Press; Cambridge,* Mass 1971 p.15.

[9] Ishwari Prasad; *RESERVATION Action for Social Equality; Criterion Publications, New Delhi.*

[10] AWR 1966(1) 294

[11] AIR 1968 SC 1379

[12] (1972) 1 SCC 660

[13] AIR 1963 SC 649

[14] AIR 1987 AP 53(FB)

[15] AIR 1995 AP 248 (FB)

[16] AIR 1967 SC 295

[17] 2003(4) SCC 289

[18] 2003(5) SCC 350

[19] 2003(8) SCC 440

[20] AIR 1964 SC 1823 : (1964) 6 SCR 368

[21] AIR 1968 SC 1012 :

[22] (1971) 1 SCC 38: (1971) 2 SCR 430

[23] (1973) 1 SCC 420:1973 SCC (L&S) 217: (1973) 3 SCR 236

[24] (1975) 1 SCC 267: (1975) 2 SCR 761

[25] 1985 Supp SCC 714 : 1985 Supp 1 SCR 352

[26] The Dynamics of Caste problems of the Indian Muslims by *Prof. Fakruddin Bennur*, published in Indian Journal of Secularism edited and published by Asghar Ali Engineer, on behalf of the *Centre for study of society and secularism, Mumbai.*

[27] (1973) 4 SCC 225

[28] (1994) 3 SCC 1

[29] (1994) 6 SCC 360

[30] (1976) 2 SCC 17

[31] AIR 1961 SC 751

[32] AIR 1974 SC 1232

[33] AIR 1974 SC 175

[34] AIR 1966 SC 1987

[35] Walton H. Hamitton, *Constitutionalism*, "Encyclopedia of Social Sciences, 255 (Edwin R.A. Seligman & Alvin Johnson; Editions – 1931) cited in CONSTITUTIONALISM Philosophical Foundations; edited by Larry Alexander.

[36] AIR 1987 SC 579

[37] (1975)1 All England reports 979

[38] AIR 1991 SC, 1473

[39] AIR 1961 SC 200

[40] AIR 1985 SC, 1019

[41] 2002(5) SCC 738

[42] AIR 1972 SC 1242

[43] 2002(8) SCC 236

[44] (2002(8) SCC 237

[45] 2000(6) ALT 438 (FB)

[46] 1998 (2) SCC 580

[47] 1998(3) SCC 218

[48] 2001(2) SCC 721

[49] 2001(8) SCC 540

[50] 2003(7) SCC 589

[51] 2003(7) SCC 628

[52] 2003(6) SCC 186

[53] 1990(3) SCC 130

[54] AIR 1955 SC 549

[55] AIR 1966 SC 1942.

[56] AIR 1991 SC 1933

[57] (1970) 2 SCR 666 : (AIR 1970 SC 370)

[58] (1983) 1 SCR 593 : (AIR 1982 SC 1579)

[59] AIR 1992 SC 1546

[60] 2003(4) SCC, 239

[61] (1990) 1 SCC 613

[62] (1974) 2 SCC 33

[63] 1971 (1) Chancery Division 734}.

[64] AIR 1936 PC 253

[65] (1995) 5 SCC 173

[66] AIR 1999 SC 2894

[67] (2000) 1 SCC 168

[68] AIR 1976 SC 490

[69] AIR 1996 SC 75

[70] The Commission observed :

> ***"Muslims :*** A number of representations have been received from the several Muslim organizations and also from individual Muslims urging for inclusion of certain sub-sects of the Muslims in the list of Backward Classes. One representative ***Sri S.B.Nabi Saheb, M.L.A., claimed that 90% of the Muslims were backward in the real sense and that therefore the entire Muslim community should be classified as backward.*** Another representative Sri Shaik Biyahani, M.L.C. pleaded that Muslims all over India are socially and educationally backward.
>
> ***It is not correct to say that Muslims as a class in this State are socially and educationally backward.*** All Muslims drawn from any stock of community are treated as equal. The traditional caste distinction never existed among the Muslims. There was social equality among all the individuals. Unlike in the Hindu society, there was no restriction on choice of occupations among the Muslims. Some families are continuing the occupation chosen by their ancestors and they are usually called but their trade name like Dudekula, Kasab, Darzi, Momin, Mochi etc. The Muslim did not recognize social distinction as was done in the case of caste groups in Hindu society. There was no segregation of communities as such among them. Gradually however, due to historical and other reasons the sense of high and low has permeated the Muslim society also. Certain occupations have come to be regarded as inferior even among the Muslims and today there are a few distinct classes among Muslims who are suffering from social inferiority due to occupation and poverty. Therefore, social backwardness among the Muslims has to be determined with reference to their hereditary occupation and poverty and without reference to caste. We consider that the following two classes of Muslims are socially and educationally backward for the reasons given against each. – **See page 201 of the Report of the Anantaraman Commission submitted in 1970.**

[71] AIR 1987 AP 53 – Para 11 – **V.Narayana Rao v. State of A.P. (FB)**

[72] In Chapter VIII of the report, the Commission observed as follows :

> ***Chapter-VIII – Minority Communities –*** 8.1. The Commission has been entrusted with the work of inquiring into the social and educational backwardness of Minority Communities in the State for the purpose of including them within the purview of Backward Classes of citizens under Articles 15(4) and 16(4) of the Constitution of India.
>
> 8.2. There are two types of Minority Communities in the State :- Firstly Linguistic Minorities and secondly Religious Minorities. The Linguistic Minorities are mostly concentrated in the border districts around the State. Almost all the Linguistic Minorities have appeared before the Commission during its visit to the border districts and made oral as well as written representations urging for their inclusion in the list of Backward Classes. Their request has been examined in detail with reference to the information gathered by the Commission and the question of inclusion or otherwise is decided in a separate Chapter dealing with the subject. Therefore there is no need to repeat the same in this Chapter.
>
> ***8.3. The claim on the ground of Religious Minorities is mostly from the Muslims in this State.***
>
> 8.4. xxx
>
> 8.5. xxx
>
> 8.6. The main question of inclusion of Muslims in the list of Backward Classes treating them as socially and educationally backward requires to be examined further. There is no caste system in the Muslim religion. The Muslim brother-hood is a sign of equality of members in the Islamic religion. There is no social segregation among the groups of Muslims. Before Mosques, all Muslims can offer their prayers jointly without any discrimination and without superiority and inferiority complex. Every Muslim is at liberty to follow any profession of his liking without any traditional barriers. Except a few Muslim sects already included in the Backward Class list and the Muslim butchers who are proposed for inclusion now, the other sects among the Muslims are enjoying equal social status and therefore there is no social backwardness among them. The Kaka Kalelkar Commission appointed by the President of India under Article 340 of the Constitution had a Muslim member Mr.Abdul Quaim Ansari. The said Commission decided that Muslim community as such was not to be treated as a Backward Class. Muslims *in toto* cannot be considered to be `socially backward' in the conventional sense known to Hindu society. This Commission entirely agrees with the above view. For any class of citizens to be treated as Backward Classes, they should satisfy the twin criteria of social and educational backwardness as indicated in Article 15(4) of the Constitution of India. ***Since there is no social backwardness among Muslims either in relation to various sects in their community or because of treatment by other religious groups like Hindus, Christians and Parsis, there is no legal justification for including all the Muslims in the list of Backward Classes."***

[73] AIR 1995 AP 248

[74] ***ibid* para 19 (per YBR,J)** …. The G.O. can at best be treated as a requisition to the Commission to send a report as regards the reservation to the communities enlisted in the G.O.
para 43 (per BSR,J)…. The impugned G.O. can be construed as such a request by the Government to the Commission to make an interim report, but it is for the Government to take steps to expedite the matter in that regard before the Commission.

[75] **15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth – (1) xxx**

> **(2) xxx**
> **(3) xxx**
> **(4)** Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

16. Equality of opportunity in matters of public employment.-

> **(1) xxx**
> **(2) xxx**
> **(3) xxx**
> **(4)** Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

[76] 1992 Supp (3) SCC 217 : AIR 1993 SC 477

[77] 1963 Supp (1) SCR 439: AIR 1963 SC 649

[78] "....The problem of determining who are socially backward classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem, and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; ***it will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way..."ibid P.No.659 – para 24***

[79] See para (847) of the judgment in **Indra Sawhaney's case (supra 7)**

[80] (2002) 8 SCC 237

[81] (1974) 1 SCC 68

[82] para (20) of the judgment in (1974) 1 SCC 68 - **20.** The power to revoke the licence is a drastic power. The revocation of licence results in severe abridgement of the right to carry on business. Having in mind the requirements of Article 19(1)(*g*). Parliament has, it seems to us, prescribed certain conditions to prevent the abuse of power and to ensure just exercise of power. Clauses (*a*) to (*d*) of Section 4 prescribe some of the conditions precedent for the exercise of power. The order of revocation, in breach of any one of those conditions, will undoubtedly be void. The clause "if in its opinion the public interest so requires" is also a condition precedent. On a successful showing that the order of revocation has been made without the Government applying its mind to the aspect of public interest or without forming an honest opinion on that aspect, it will, we have no doubt, be void. The phrase "after consulting the State Electricity Board" is sandwiched between the clause "if in its opinion the public interest so requires" and clauses (*a*) to (*d*). In this context it appears to us that consultation with the Board is also a condition precedent for making the order of revocation. Accordingly the breach of this condition precedent should also entail the same consequence as the breach of the other conditions referred to earlier. It may be observed that the phrase "after consulting the State Electricity Board" did not find place in Section 4 as it stood originally. It was introduced in Section 4 in 1959 by an amendment. It seems to us that it was introduced in Section 4 with the object of providing an additional safeguard to the licensee. When revoking a licence, the State Government acts in two stages. At first it forms a tentative opinion in favour of revoking the licence. Then it calls for an explanation from the licensee. When the explanation is received, it considers the explanation. If not satisfied with the explanation, it passes the final order of revocation. First impressions and provisional judgments have a tendency to become ultimate ideas and final judgments. They would settle unconsciously on the investigator's mind as the imperceptible dust-particles on an optical lens. They would dim his understanding and obfuscate his observation. Facts which will dovetail with them would arrest his attention; facts which will conflict with them would flit his observation. If by any chance he happens to notice refractory facts, he would seek to reconcile them with his first impressions and provisional judgments. This understanding of human psychology seems to have pursuaded Parliament to interpose the condition of the Board's consultation to the Government's action. The Board is an independent body. It consists of three members. One of them is a technical expert, the other a financial expert, and the third an administrative expert. While considering the facts presented to it by the Government and by the licensee in his explanation, the Board will undoubtedly act with an open and unconditioned mind and will be able to offer unbiased counsel to the Government. Having regard to the object and context, we are of the view that the condition of consulting the Board is mandatory and the breach of this condition will make the order of revocation void. We have already held that the Board was not consulted after the explanation was received. Accordingly we are of opinion that the order is void. The consequential order of acquisition will ipso facto fall down.

[83] AIR 1966 SC 1987

[84] para (7) of the judgment – **7.** The first question turns upon the provisions of Article 233 of the Constitution. Article 233(1) reads:

"Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State."

We are assuming for the purpose of these appeals that the "Governor" under Article 233 shall act on the advice of the Ministers. So, the expression "Governor" used in the judgment means Governor acting on the advice of the Ministers. The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of district judge in consultation with the High Court. The object of consultation is apparent. The High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the "judicial service" or to the bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (*i*) by not consulting the High Court at all, and (*ii*) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him. That this constitutional mandate has both a negative and positive significance is made clear by the other provisions of the Constitution. Wherever the Constitution intended to provide more than one consultant, it has said so: see Article 124(2) and 217(1). Wherever the Constitution provided for consultation of a single body or individual it said so : see Article 222. Article 124(2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein. To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D.

[85] AIR 1961 SC 200

[86] AIR 1957 SC 912

[87] AIR 1958 SC 419

[88] 1917 AC 170

[89] (1974) 2 SCC 33

[90] 1971 Court of Appeal (CA) at Page No.743.

[91] **Lord Denning M.R**. - I will next consider the defence of "necessity." There is authority for saying that in case of great and imminent danger, in order to preserve life, the law will permit of an encroachment on private property. That is shown by ***Mouse's case (1609) 12 Co. Rep. 63,*** where the ferryman at Gravesend took 47 passengers into his barrage to carry them to London. A great tempest arose and all were in danger. Mouse was one of the passengers. The defendant threw a casket belonging to the plaintiff (Mouse) overboard so as to lighten the ship. Other passengers threw other things. It was proved that, if they had not done so, the passengers would have been drowned. It was held by the whole court "that in case of necessity, for the saving of the lives of the passengers it was lawful for the defendant, being a passenger, to cast the casket of the plaintiff out of the barges..." The court said it was like the pulling down of a house, in time of fire, to stop it spreading, which has always been held justified *pro bono publico*.

The doctrine so enunciated must, however, be carefully circumscribed. Else necessity would open the door to many an excuse. It was for this reason that it was not admitted in ***Reg. v. Dudley and Stephens (1884)14 Q.B.D. 273 ,***where the three shipwrecked sailors, in extreme despair, killed the cabin boy and ate him to save their own lives. They were held guilty of murder. The killing was not justified by necessity. Similarly, when a man who is starving, enters a house and takes food in order to keep himself alive. Our English Law does not admit the defence of necessity. It holds him guilty of larceny. Lord Hale said that "if a person, being under necessity for want of victuals, or clothes, shall upon that account clandestinely, and *animo furandi,* steal another man's food, it is felony....": Hale, Pleas of Crown i.54. The reason is because, if hunger were once allowed to be an excuse for stealing, it would open a way through which all kinds of disorder and lawlessness would pass. So here. If homelessness were once admitted as a defence to trespass, no one's house could be safe. ***Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine that they were in need, or would invent a need, so as to gain entry. Each man would say his need was greater than the next man's. The plea would be an excuse for all sorts of wrong doing.*** So the courts must, for the sake of law and order, take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless: and trust that their distress will be relieved by the charitable and the good."

Edmund Davies L.J., dealing with the said question , held :

"These appeals raise in an acute form the questions as to whether a plea of necessity is a defence to otherwise unlawful acts, whether such a plea has any place in English law, and, if it does exist, what are the limits and extent of its application.

Firstly, then, does it exist ? The matter has been learnedly treated by Professor Glanville Williams in Current Legal Problems, Vol.6 (1953), p.216, and also in his Criminal Law, 2nd ed. (1961), para.229 and the succeeding paras, pp.722-746. That the plea may in certain cases afford a defence does emerge from the recorded decisions – see, for example, ***Mouse's case, 12 Co.Rep. 63.*** **In Moore v. Hussey (1609) Hob.93, 96, Hobart C.J.** said : "All laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity, either of compulsion of inconvenience...."

But when and how far is the plea of necessity available to one who is *prima facie* guilty of tort ? Well, one thing emerges with clarity from the decisions, and that is that the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear – necessity can very easily become simply a mask for anarchy. ***As far as my reading goes, it appears that all the cases where a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril :*** for example, the forcible feeding of an obdurate suffragette, as in ***Leigh v. Gladstone (1909) 26 TLR 139, 142,*** where Lord Alverstone C.J. spoke of preserving the health and lives of the prisoners who were in the custody of the Crown; or performing an abortion to avert a grave threat to the life, or, at least, to the health of a pregnant young girl who had been ravished in circumstances of great brutality, as in ***Rex v. Bourne [1939] 1 K.B. 687;*** or as in the case tried in 1500 where it was said in argument that a person may escape from a burning gaol notwithstanding a statute making prison-breach a felony, "for he is not to be hanged because he would not stay to be burnt." See Glanville Williams, Criminal Law, 2nd Ed., pp.725, 726. Such cases illustrate the very narrow limits with which the plea of necessity may be invoked. Sad though the circumstances disclosed by these appeals undoubtedly are, they do not in my judgment constitute the sort of emergency to which the plea applies."

The third Judge **Megaw L.J.,** agreed on this point with the other Judges.

[92] (1995) 5 SCC 173

[93] AIR 1999 SC 2894

[94] See **High Court of Judicature for Rajasthan v. Ramesh Chand Paliwal – (1998) 3 SCC 72 (para 31); Sumedico Corporation v. Regional Provident Fund Commissioner – (1998) 8 SCC 381 (para 2)**

[95] AIR 1993 SC 477

[96] AIR 1987 AP 53 (F.B)

[97] AIR 1995 AP 248 (F.B.)

[98] (2000) 1 SCC 168

[99] AIR 1968 AP 165

[100] AIR 1972 SC 1375

[101] AIR 1963 SC 647

8 AIR 1996 SC 75

9 AIR 2001 (1) SC 98